FILED

(1) 98 4 6 JUL 2 1998

No. ——— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 Evergreen Road
Suite 200
Southfield, MI 48076
(248) 948-1010

DONALD F. GRIFFIN
Assistant General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G Street, N.E.
Suite 460
Washington, D.C. 20001-1511
(202) 638-2135

RICHARD S. EDELMAN *
Of Counsel
O'DONNELL, SCHWARTZ & ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, DC 20036
(202) 898-1824
Attorneys for Petitioner

* Counsel of Record

Date: July 2, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 PP

QUESTION PRESENTED

Whether a dispute between a rail carrier and a union which the union contends is a Railway Labor Act "major dispute" over a unilateral change in the parties' agreement, but the carrier contends is a "minor dispute" over the carrier's interpretation of the agreement, may be classified as a minor dispute when the carrier's contract interpretation claim is not even arguably justified under any express term of the parties' agreement or any term implied from past practice, is refuted by the plain language of its express terms and is predicated solely on evidence external to the agreement.

LIST OF PARTIES AND PARENT COMPANIES
(Parent Companies Indicated in
Parentheses Where Applicable)

Petitioner

Brotherhood of Maintenance of Way Employees

Respondents

Atchison, Topeka & Santa Fe Railway
(Santa Fe Pacific Corporation)

Burlington Northern Railroad
(Burlington Northern, Inc.)

Consolidated Rail Corporation
(Conrail, Inc.)

CSX Transportation, Inc.
(CSX Corporation)

Norfolk Southern Railway Company
(Norfolk Southern Corporation)

Norfolk and Western Railway Company
(Norfolk Southern Corporation)

Union Pacific Railroad Company
(Union Pacific Corporation)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND PARENT COMPANIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S DECISION IN *CONRAIL* AND WOULD FUNDAMENTALLY ALTER THE RLA	9
II. THE COURT SHOULD GRANT THIS PETITION IN ORDER TO REAFFIRM THE MAJOR/MINOR TEST SET FORTH IN *CONRAIL* AND TO INSURE PROPER APPLICATION OF THE RLA	15
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Atlanta & West Point R.R. Co. v. United Transp. Union, 439 F.2d 73 (5th Cir. 1971) 8, 9
Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) 7, 8
Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Railway Co., et al., 138 F.3d 635 (7th Cir. 1998) ..... *passim*
Brotherhood of R.R. Trainmen v. Jacksonville Term. Co., 394 U.S. 369 (1969) 16
Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employes, 481 U.S. 429 (1991) 16
Chicago & Northwestern Ry. Co. v. United Transp. Union, 402 U.S. 570 (1971) 20
Consolidated Rail Corp. v. Railway Labor Exec's Ass'n, 491 U.S. 299 (1989) ..... *passim*
Detroit & Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142 (1969) ..... *passim*
Elgin, Joliet & Eastern R.R. Co. v. Burley, 325 U.S. 711 (1945) 16, 20
Hawaiian Airlines v. Norris, 512 U.S. ——, 129 L.Ed.2d 208 (1994) 13
Ideal Mutual Insurance Co. v. Last Days Evangelical Ass'n, 783 F.2d 1234 (5th Cir. 1986) 18
Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen, 882 F.2d 778 (3rd Cir. 1989) ..... *passim*
Transportation Communications Employees Union v. Union Pac. R.R. Co., 385 U.S. 157 (1966) 6, 13, 14
United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 6, 13, 14

STATUTES AND OTHER MATERIALS RELIED UPON:

Railway Labor Act, 45 U.S.C. § 151 *et seq.*
Section 2 Seventh, 45 U.S.C. § 152 Seventh ..... *passim*
Section 3, 45 U.S.C. § 153 ..... 2, 7, 10
Section 6, 45 U.S.C. § 156 ..... *passim*
Section 9a, 45 U.S.C. § 159a 19

TABLE OF AUTHORITIES—Continued

	Page
Norris LaGuardia Act, 29 U.S.C. § 101 *et seq.*	2, 3
28 U.S.C. § 2101 (c)	2
28 U.S.C. § 1254 (1)	2
Allan Bloom, *The Closing Of The American Mind* (Simon & Schuster 1987)	17
Robert Bork, *The Tempting Of America* (The Free Press 1990)	17
Gertrude Himmelfarb, *On Looking Into The Abyss* (Alfred A. Knopf 1994)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ——

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, the Brotherhood of Maintenance of Way Employes ("BMWE"), respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Railway Co. et al.*, 138 F. 3d 635 (7th Cir. 1998), which was entered on December 22, 1997 and modified by en banc order entered on April 7, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 138 F.3d 635. The panel opinion is

reproduced herein as Appendix A to this Petition at 1a-21a. The decision of the United Sttates District Court for the Central District of Illinois which was reversed by the Seventh Circuit is reproduced herein as Appendix B at 22a-37a. The Order of the Court of Appeals en banc modifying the panel opinion is not reported and is reproduced herein as Appendix C at 38a-40a.

JURISDICTION

The panel decision of the United States Court of Appeals for the Seventh Circuit was entered on December 22, 1997, but petitioner filed a timely petition for rehearing and rehearing en banc. The full Seventh Circuit entered its decision denying the petition, but modifying the panel decision, on April 7, 1998. This Petition is timely under 28 U.S.C. § 2101(c) and Rule 13 of the Rules of this Court since it is being filed within ninety days of issuance of the en banc order of the Court of Appeals. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation and application of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., and the proper balancing of different requirements of that Act. Section 2 Seventh of the RLA, 45 U.S.C. § 152 Seventh, requires maintenance of the status quo as to rates of pay, rules and working conditions under agreements and that changes to agreements may be made only through bargaining under RLA Section 6, 45 U.S.C. § 156. Disputes involving changes in agreements are referred to as "major disputes." Section 3 of the RLA, 45 U.S.C. § 153, requires arbitration of grievances and other disputes involving interpretation of provisions of existing agreements. Such disputes are referred to as "minor disputes." Because the decision below directed the District Court to enter an injunction in a labor dispute, the case also involves the Norris LaGuardia Act ("NLGA"), 29

U.S.C. § 101 et seq. Relevant portions of the RLA and NLGA are reproduced in Appendix D hereto at 41-44a.

STATEMENT OF THE CASE

This case concerns a dispute between BMWE and most of the Nation's railroads ("Railroads") over payment of specified amounts of travel expenses ("travel allowances") to their track maintenance and repair workers who travel to differing work locations throughout their work seasons ("traveling employees").

The dispute arose almost immediately after BMWE and the Railroads entered a new national collective bargaining agreement. That agreement was the product of negotiations which followed the issuance of the report of Presidential Emergency Board ("PEB") No. 229. Appendix A at 5a. The Article XIV travel allowance provision adopted the PEB 229 recommendation on that subject by incorporating the PEB's travel allowance language with only minor changes. Appendix A at 5a, Appendix B at 26a.

In the courts below, BMWE contended that under the plain language of Article XIV of the Agreement, all "traveling employees" are entitled to the travel allowance, whereas the Railroads contended that only traveling employees in so called "regional and system gangs" are entitled to the allowance. Appendix A at 6a. BMWE asserted that the Railroads' implementation of Article XIV so that it covered only regional and system gang traveling employees, as opposed to all traveling employees, constituted a unilateral change in the agreement and a major dispute. The Railroads asserted that the dispute involved a difference in interpretation of the agreement and not a change of the agreement, so the case involved a minor dispute. The Railroads' contract interpretation defense was not based on the express terms of the written agreement, or the terms of an implied agreement established through past practice accepted by labor and management;

rather their defense was based on testimony and submissions to PEB 229. Appendix A at 9a-10a; Appendix B at 30a.

The District Court held that the case involved a major dispute under the standards set forth by this Court in *Consolidated Rail Corp. v. Railway Labor Execs. Ass'n*, 491 U.S. 299 (1989) ("*Conrail*"). *See Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Ry. Co. et al.* Nos. 96-1515 and 96-1524 (C.D. Ill. December 17, 1996). Appendix B at 27a-30a. It found that the plain language of Article XIV unambiguously applies to all traveling employees, and that the Railroads had conceded that, on its face, the provision covers all traveling employees, not just the regional and system gang subset of traveling employees, so the Railroads' actions constituted a unilateral amendment of Article XIV, rather than application of an arguable interpretation of that provision. *Id.* at 28a-30a. The District Court stated:

> The Court finds, *and the Carriers appear to concede*, that the plain language of Article XIV of the CBA unambiguously applies to *all* traveling employees. The first sentence of section 1(a) refers to "work season employees." However, it is undisputed that work season employees are not limited to regional and system gang employees. The next two sentences note that the initial reporting location "could be hundreds of miles from their residences" and go on to state that these employees may be "hundreds of miles from home at the end of each week." However, this is just as true for employees who travel within a single seniority district as for regional and system gang employees because single districts can span hundreds of miles. The fourth sentence plainly states that "the carriers will pay *each employee* a minimum travel allowance," thus implying that no restriction exists as to the particular type of employee.

Id. at 28a-29a, (first emphasis added). The District Court rejected the Railroads' effort to characterize the dispute as minor by relying on language in the PEB 229 report and BMWE submissions to the PEB because the record reflected that the language of Article XIV was indeed plain and unambiguous. *Id.* at 30a.

The Court of Appeals agreed with the District Court that the language of Article XIV is plain and unambiguous. Appendix A at 6a-7a. The decision of the panel majority that was modified slightly by the Court en banc stated that in differentiating between regional and system gang traveling employees and all other traveling employees, "[t]he Railroads propose a theoretically plausible distinction, but one that has no basis in the text." Appendix A at 7a. And the dissenting member of the panel stated "[t]hus as we all agree, it is practically impossible in the face of this language to conclude that the Article XIV travel allowances are payable only to members of regional and system gangs, rather than to all employees who travel the prescribed distances." Appendix A at 7a. The panel majority further stated that it would have held the Railroads' position to be " 'frivolous or obviously insubstantial' " and would have affirmed the district court "if the act of interpretation were to stop at the four corners of the Agreement." Appendix A at 6a-7a.

However, the majority held that the dispute was minor even though the Railroads' position was not arguably justified under either the express terms of the parties' agreement or terms implied through past practice. The majority concluded that it was required to look "beneath the surface of the text", (Appendix A at 10a), to "incorporate sources of meaning beyond the Agreement itself." *Id.* at 7a. Although the panel majority stated that a party may not be freed "from the consequences of assenting to a text" it stated that its "purpose" was "to ascertain whether the ostensible meaning of Article XIV—*lucid and definitive as it might seem*—is in fact the right one."

Id. at 9a, (emphasis added). In short, the panel majority concluded that even when a contract term is plain and unambiguous, "[i]f an ambiguity is asserted to exist beneath the surface of that text, we cannot believe that Congress would have us blind ourselves to what its original drafters *meant to say*." *Id.* at 10a, (emphasis added). In so holding, the panel majority relied upon the decisions in *Transportation Communications Employees Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 160-161 (1966) ("*TCEU v. Union Pacific*"), *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960) ("*Steelworkers*") and *Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen*, 882 F. 2d 778, 784-85 (3rd Cir. 1989) ("*SEPTA*"). Appendix A at 7a-9a.

Once it held that it could look beyond the apparently lucid and definitive language of Article XIV to evidence extrinsic to the terms of the agreement, the panel majority considered the PEB 229 record and then found that portions of the PEB 229 report and BMWE submissions to the PEB rendered the Railroads' interpretation of Article XIV at least arguably justifiable because that evidence suggested that "a latent ambiguity may exist in the Agreement." Appendix A at 9a, 13a. It thus found a minor dispute even though the Railroads' position was not arguably justified under any express or implied term of the parties' agreement.

In dissent, Judge Wood stated that because she saw "no ambiguity or vagueness either in the pertinent article of the agreement or in the context of the agreement as a whole I would not resort here to extrinsic evidence at all." *Id.* at 20a. Judge Wood acknowledged that *Steelworkers* and *TCEU v. Union Pacific* had held that interpretation of a collective bargaining agreement ("CBA") could involve consideration of evidence extrinsic to the CBA, but she concluded that those cases did not address the question of whether resort to extrinsic evidence was proper when

the CBA language is on its face clear and unambiguous. *Id.* at 16a-17a. She further observed that the Seventh Circuit had held *en banc* that extrinsic evidence may not be used to create ambiguity in a contract, to add new contract terms or to contradict explicit contract terms. *Id.* at 16a, *citing Bidlack v. Wheelabrator Corp.*, 993 F. 2d 603, 608, 616 (7th Cir. 1993) (*en banc*). Judge Wood concluded by stating that:

> Whether [the outcome that she would reach] is a good thing or a bad thing for national labor policy I am not qualified to say. But it is the statutory system Congress has given us in the Railway Labor Act, and I respectfully suggest we must follow it even when the result is identification of a major dispute.

Appendix A at 20a-21a. The panel majority responded to the concerns expressed by Judge Wood by noting only that "the Rubicon has been crossed by the Third Circuit in *SEPTA*" with respect to considering extrinsic evidence in finding a minor dispute "when the plain language of an agreement seems clear." Appendix A at 9a n. 1.[1]

BMWE filed a Suggestion for Rehearing En Banc, which under Seventh Circuit Rules was treated as a petition for rehearing and for rehearing en banc. BMWE argued that the panel majority's decision conflicts with this Court's decision in *Conrail*, which established the standards for determining whether an RLA dispute is a Section 2 Seventh "major dispute" over negotiation or alteration of a CBA, or a Section 3 "minor dispute" over interpretation of an

---

[1] In *SEPTA*, the Third Circuit held that although the plain language of letter agreements concerning sympathy strikes was limited in scope, in classifying a dispute over those agreements as major or minor, the district court properly considered testimony of the company's chief negotiator that he actually intended to draft a broad limitation on sympathy strikes, and that such evidence could be sufficient to render the dispute over the letter agreements one over interpretation of the agreements and thus minor, notwithstanding the limits of the plain language of the agreements.

existing CBA which must be resolved by an RLA arbitration board.

On April 7, 1998, the Seventh Circuit issued its order denying the petition for rehearing en banc. Appendix C at 39a. Seven Judges voted to deny the petition; four Judges (Judges Posner, Flaum, Rovner and Wood) voted in favor of the petition. The full court did modify the panel majority's opinion by adding language to footnote 1 (Appendix A at 9a n.1), which extended the majority opinion's response to the dissenting Judge's reliance on the prior decision of the full court in *Bidlack*. Appendix C at 40a.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that this Court should review the decision below because the Seventh Circuit has applied a test for determining whether an RLA dispute is major or minor which is fundamentally at odds with this Court's decision in *Conrail* and the RLA itself. If allowed to stand, the Seventh Circuit's decision will effectively eviscerate a key component of the RLA: the Section 2 Seventh requirement for maintenance of the status quo as to CBA terms and its prohibition against mid-term unilateral changes in agreements.

In *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142 (1969) (*"Shore Line"*), the Court stated that "[t]he [RLA's] status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike" (396 U.S. at 150), and that if the railroad is free to unilaterally change the status quo, "the union can not be expected to hold back its own economic weapons including the strike. Only if both sides are equally restrained can the Act's remedies work effectively". *Id.* at 155 (citations omitted). *See also Atlanta & West Point R.R. Co. v. United Transp. Union,*

439 F.2d 73, 80 (5th Cir. 1971), *citing Shore Line*. In *Conrail* the Court said that, because of the importance of the Act's status quo provisions, "the district courts have jurisdiction to enjoin a violation of the status quo pending completion of the required procedures without the customary showing of irreparable harm". 491 U.S. at 303 (*citing Shore Line*).

The *Conrail* Court therefore finely balanced its major/minor test to give effect to both the status quo and arbitration requirements of the RLA. 491 U.S. at 306. Although the test places a relatively light burden on management, the Court held that a dispute is minor only when management carries that burden by showing that its defense to the union's claim of unilateral change is arguably justified under the terms of the parties' agreement. 491 U.S. at 306, 310. The Seventh Circuit's decision upsets this delicate balance and effectively reworks the statutory scheme by finding a minor dispute when the carrier's position is not arguably justified under the terms of the agreement, but is actually refuted by its plain language. The problem with the Seventh Circuit's decision is compounded by the fact that it relied heavily on the Third Circuit's decision in *SEPTA*. With the recent mega-mergers in the railroad industry, every major railroad can bring an action in either the Seventh or Third Circuit. If the decision below is not reviewed, this line of precedent will effectively become the standard for classifying RLA disputes. Accordingly, the Court should grant the writ to prevent a judicial re-working of the basic design of the Railway Labor Act.

I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S DECISION IN *CONRAIL* AND WOULD FUNDAMENTALLY ALTER THE RLA

In *Conrail* this Court held that when a union claims an RLA violation, and a carrier asserts a contractual defense, the dispute is minor if the interpretation of the CBA relied

on by the carrier is at least "arguably justified by the terms of the parties' agreement". 491 U.S. at 310. The Court explicitly stated that the reason for devising this test was to balance two competing RLA mandates: the prohibition against unilateral changes in CBAs without completion of RLA collective bargaining processes (Sections 2 Seventh and 6), and the requirement for arbitration of contract interpretation disputes (Section 3). 491 U.S. at 306.

This Court realized that when a carrier asserts a contractual defense to a union's claim of a unilateral change of an existing agreement, allowing the carrier's bald characterization of the dispute to control would risk "undercut[ting] 'the prohibitions of § 2 Seventh and § 6 of the Act' against unilateral imposition of new contract terms" (491 U.S. at 306, citations omitted), but that allowing unions to avoid arbitration and potentially strike or invoke federal court jurisdiction in contract interpretation disputes would be inconsistent with the RLA arbitration scheme. The Court balanced these two RLA mandates by placing a "relatively light burden" on the carrier to show that its contractual defense is at least arguably justified or is not obviously insubstantial under "the *terms* of the parties' collective-bargaining agreement." 491 U.S. at 307 (emphasis added).[2]

Although *Conrail* created a relatively light burden for carriers, it required that courts make sure that the carrier's showing has sufficient support under the terms of the CBA. The Court observed that "there is danger in leaving the

---

[2] The Court recognized two types of agreement terms: express written contract language, and terms implied by past practice that have ripened into agreements through mutual acquiescence. 491 U.S. at 308, 309, 311, 312. The practice in question in *Conrail* was not addressed in the parties' written contract, but was part of their agreement as an implied term because of consistent past practice. Because that implied term arguably justified the carrier's action, the dispute in that case was found to be minor. *Id.* at 312, 317.

characterization of the dispute solely in the hands of one party" so "protection of the proper functioning of the statutory scheme requires the court to substitute its characterization [of the dispute as major or minor] for that of the claimant". 491 U.S. at 306. Thus, it is clear that although the Court recognized that carriers and unions must arbitrate contract interpretation disputes, it also recognized a significant countervailing statutory concern for prohibition against unilateral changes in CBAs so that the courts must be gatekeepers, policing the line between major and minor disputes in light of both RLA directives. The major/minor test of arguable justification under the terms of the parties' CBA was designed to account for both statutory mandates. If the carrier can not make the minimal showing under the terms of the agreement, then, under *Shore Line*, if the carrier continues its course of action, it is subject to a status quo injunction or retaliatory exercise of self help by the union.

BMWE respectfully submits that the Seventh Circuit's decision in the instant case is inconsistent with the decision in *Conrail* and thus works an effective revision of the RLA because it finds that the Railroads carried their burden even though their contractual claim was not even arguably justified under the terms of the CBA; either the plain language of the written agreement or any term implied by past practice. Rather, having accepted the District Court's conclusion that the terms of Article XIV were clear and unambiguous and could not be read to support the Railroads' contractual defense to BMWE's claim of violation of Sections 2 Seventh and 6 (Appendix A at 5a-7a), the Seventh Circuit nonetheless held that the Railroads' position was at least arguable based on evidence extrinsic to the CBA; i.e., selected portions of the record before PEB 229 which suggested "latent ambiguity" in otherwise clear agreement language. Appendix A at 7a-14a. The Seventh Circuit concluded that it was required to consider "sources of meaning beyond the agreement" in making the major/minor determination; and it described its purpose as "to

ascertain whether the ostensible meaning of Article XIV—lucid and definitive as it might seem—is in fact the right one". *Id.* at 9a. This approach is fundamentally at odds with this Court's decision in *Conrail.* Nothing in Conrail states or suggests that a dispute may be considered minor if the carrier's position is not arguably justified under the express or implied terms of the CBA, but may be arguably justified based on extrinsic evidence used to deconstruct the express terms of the CBA.

This Court did not establish a standard under which a dispute is minor if the carrier's position is arguably justifiable or non-frivolous in the abstract, or upon consideration of any evidence that may be placed before the court as gatekeeper. Rather it expressly tied the justifiability inquiry to "*the terms of the parties' agreement*". *Conrail,* 491 at U.S. 310 (emphasis added). It repeatedly used that phrasing in describing the major/minor test. 491 U.S. at 307, 310, 320. Indeed, in the express statement of the holding establishing the major/minor test, the Court referred to the test as whether the carrier's contractual defense was arguably justified under the terms of the CBA. *Id.* at 310. And in the concluding paragraph of the decision, the Court stated that it had held that "Conrail has met the light burden of persuading this Court that its drug-testing practice is arguably justified by the terms of its implied collective bargaining agreement". *Id.* at 320.[3]

[3] In the Court of Appeals, the Railroads argued that the *Conrail* Court described the major/minor test as an inquiry into whether the carrier's position is "arguably justfiied" generally, or "frivolous" or "insubstantial" generally; and that not every phrasing of the test "incorporate[d] the union's magic words 'by the terms of the agreement' ". *E.g.* Appellants' Opposition to Pet. for Rehearing at 2, 7-8. However, as we have shown, the words "by the terms of the agreement" were used each time the Court described its holding regarding the major/minor test. 491 U.S. at 307, 310, 320. And when the Court used the locutions "frivolous" and "obviously insubstantial", it did so in connection with describing the test as "arguably justified under the terms of the agreement". *Id.* at 307, 310.

The importance to the *Conrail* Court of the effort to reconcile both aspects of the RLA is shown by the Court's next decision which discussed the major/minor dichotomy: *Hawaiian Airlines v. Norris*, 512 U.S. ——, 129 L. Ed. 2d 203, 219 (1994). There the Court used the same phrasing: is the carrier's position arguably justified by the terms of the parties' agreement. And the Court again said that the " 'arguably justified' standard" was devised for "policing the line between major and minor disputes" because merely accepting a carrier's characterization of a dispute as minor "ran the risk of undercutting the RLA's prohibition 'against unilateral imposition of new contract terms' ". 129 L. Ed. 2d at 219 (*quoting Conrail*).

Thus, a carrier can carry its burden of proving a dispute to be minor only by supporting its position under the terms of the CBA; that burden is relatively light because the terms relied upon need only arguably justify the carrier's position, but that burden must be carried by reference to the terms of the CBA.

However, the Seventh Circuit reversed the District Court's finding of a major dispute and held that the travel allowance dispute was minor, even though the Railroads' contractual defense (1) was not arguably justified by the express or implied terms of the parties' agreement, (2) was actually refuted by the express terms of the agreement and (3) was found arguable solely on the basis of certain submissions and testimony before PEB 229. The Seventh Circuit's decision is therefore in direct conflict with decisions of this Court and with the labor relations scheme devised in the RLA.

The court below attempted to rationalize its holding by citing language from this Court's *TCEU v. Union Pacific* and *Steelworkers* decisions that CBAs include terms derived from custom, usage and practice, as supporting the Railroads' ability to rely on evidence external to the parties' written agreement in making a minor dispute

claim. Appendix A at 7a-8a. However, neither decision permits the finding of a minor dispute in this case despite the holding in *Conrail.*

First, *Conrail* is the controlling authority regarding the classification of disputes as major or minor, and neither *TCEU v. Union Pacific* nor *Steelworkers* even addressed the major dispute/minor dispute question. Second, the *Conrail* Court itself cited *Steelworkers* and *TCEU v. Union Pacific.* It noted that those decisions had held that, because of the nature of collective bargaining relationships, and because contracts arrived at through repeated collective bargaining are generalized codes designed to cover many situations not all of which can be anticipated by contract drafters, there may be agreement terms which are not set forth in written agreements, but are derived through custom, usage and past practice (491 U.S. at 308, 311); in essence, implied agreements. That discussion of *TCEU v. Union Pacific* and *Steelworkers* was the basis for the Court's holding in *Conrail* that the major/minor test applies to implied agreements as well as express agreements, but it still required that a carrier's position be predicated on an interpretation of an agreement term, either express or implied, for a dispute to be minor. Indeed, the closing paragraph of the *Conrail* decision stated that the carrier's position was "arguably justified by the *implied terms* of its collective bargaining agreement." 491 U.S. at 320 (emphasis added). However, in this case the Seventh Circuit found a minor dispute based solely on portions of the PEB 229 record and portions of the Report of PEB No. 229. Appendix A at 11a-12a.

The *Conrail* Court's citation to *TCEU v. Union Pacific* and *Steelworkers* demonstrates that it accounted for their holdings that CBAs include implied terms in concluding that a minor dispute defense must be predicated on the terms of the parties' CBA. But the *Conrail* Court did not state, and its citation to *TCEU v. Union Pacific* and *Steelworkers* did not imply, that a minor dispute may be

created by bargaining history or other evidence besides express or implied agreement terms. Nor did the Court state that a minor dispute may be found when a carrier's position is arguably justifiable in the abstract, or based on any evidence that might be offered to a court.

Thus, the fact that the Court has recognized that written agreements do not always constitute the entirety of agreement terms in labor contracts, does not mean that a court performing the gatekeeper function under *Conrail* may rely on bargaining history or similar extrinsic evidence to find latent ambiguity in clear written contract terms, or to find that a lucid and definitive contract provision arguably could mean something different than what it plainly states. If a carrier cannot show that some express or implied agreement term even arguably supports its position, then proper balancing of RLA interests requires judicial enforcement of Sections 2 Seventh and 6.

Because the Seventh Circuit concluded that this case involved a minor dispute without identifying any express or implied contract term which arguably supported the Railroads, its decision is plainly contrary to the decision in *Conrail* and constitutes a judicial revision of the RLA.

II. THE COURT SHOULD GRANT THIS PETITION IN ORDER TO REAFFIRM THE MAJOR/MINOR TEST SET FORTH IN *CONRAIL* AND TO INSURE PROPER APPLICATION OF THE RLA

This petition should be granted because of the serious adverse impact the Seventh Circuit's decision would have on the RLA. If a carrier is not required to justify its contractual defense to a claim of unilateral change under the terms of the CBA, then Sections 2 Seventh and 6 are effectively undercut as the Court feared they would be if a proper balancing test was not devised. If the decision below is allowed to stand it would be virtually impossible for a union to show a unilateral change because even a departure from clear contract language would not be

enough to establish a violation of Sections 2 Seventh and 6. A mere assertion that extrinsic evidence suggests a possible latent ambiguity in facially plain language would be enough to defeat federal court jurisdiction to enforce those provisions, or to defeat the union's ability to respond in kind to a carrier's exercise of self-help. Indeed, given the Seventh Circuit's view that the available extrinsic evidence here probably weighed in favor of BMWE, but was still not enough to defeat the minor dispute claim (Appendix A at 12a n. 2 and 13a), it is difficult to even imagine what a union could do to effectively rebut a carrier's assertion of latent ambiguity in clear language of a CBA allegedly created by extrinsic evidence.

While the grievance/arbitration process is provided to resolve CBA interpretation and application disputes, changes in agreements must be negotiated with the existing rules maintained, and courts are permitted to bar unilateral changes and unions may strike in response to unilateral changes. The goal of the RLA is not merely to prevent strikes, as the Seventh Circuit apparently concluded. Appendix A at 8a, *citing Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 451 (1987). Rather, it is to prevent strikes by channeling disputes into the bargaining and mediation processes of the Act. *Shore Line*, 396 U.S. at 148-150; *Elgin, Joliet & Eastern R.R. Co. v. Burley*, 325 U.S. 711, 722-728 (1945); *Brotherhood of R.R. Trainmen v. Jacksonville Term. Co.*, 394 U.S. 369, 379-380 (1969). And the Act's status quo provisions are central to achievement of that goal. *Shore Line*, 396 U.S. at 150. This goal of the Act is not furthered by enjoining a strike in response to unilateral carrier action where the Act's dispute resolution processes and status quo requirements are avoided. *Shore Line*, 396 U.S. at 150, 154-155. Indeed in *Burlington Northern v. BMWE*, this Court observed that "An injunction does not settle a dispute—it simply disables one of the parties", 481 U.S. at 451.

A rule that a carrier may, without consequence, implement a challenged practice, despite clear contract language to the contrary, by citing evidence extrinsic to the contract is fundamentally at odds with the statutory scheme as it was described in *Shore Line* and *Conrail*. What is the value of protracted negotiations over written agreements if even clear language is subject to post-hoc revision by resort to extrinsic evidence? What is the point of making the effort to negotiate clear contract language when one of the parties can subsequently rely on extrinsic evidence to argue that the parties' rights and obligations are not as described in the clear language? Indeed, the value of written agreements and the incentive to attempt to express agreement terms in detailed written provisions will both be diminished if carriers are not bound to what they undertake and agree to in the clear language of a CBA. Thus, allowing the decision below to stand will have far reaching adverse consequences for labor relations under the RLA.

The Court below was apparently concerned that affirming the District Court's decision would result in an application of the parties' agreement that might not have been what was intended. Thus, the Court stated that "[o]ur purpose is to ascertain whether the ostensible meaning of Article XIV—lucid and definitive as it might seem —is in fact the right one." Appendix A at 9a. However, if the language of an agreement is indeed lucid and definitive, then it surely does reflect the actual intent of the parties. The Seventh Circuit's entire approach to this problem is reminiscent of that of literary "deconstructionism" or "post modernism" which Gertrude Himmelfarb has described as "den[ying] the fixity of any text" [4], Allan Bloom has characterized as holding that "there is no text, only interpretation" [5] and under which, according to Robert Bork, "any reading of the texts becomes legitimate" [6].

---

[4] Gertrude Himmelfarb, *On Looking Into The Abyss* 133 (1994).

[5] Allan Bloom, *The Closing Of The American Mind* 379 (1987).

[6] Robert Bork, *The Tempting of America* 137 (1990).

However, as the Fifth Circuit has said "[u]nlike the deconstructionists at the forefront of modern literary criticism, the courts still recognize the possibility of an unbiguous text." *Ideal Mutual Insurance Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234 (5th Cir. 1986). The approach taken by the Seventh Circuit is as destructive to application of labor contracts and the RLA collective bargaining process as the deconstructionists are to literature.

The Seventh Circuit also seemed to feel obliged to insure that the Railroads have every opportunity to demonstrate the legitimacy of their claimed contractual defense. Thus it stated "[i]f an ambiguity is asserted to exist beneath the surface of that text, we cannot believe that Congress would have us blind ourselves to what its original drafters meant to say." Appendix A at 10a. However, there is nothing in the RLA or RLA precedent that even remotely suggests that the courts have such an active role with respect to divining the "true", but unexpressed, meaning of contract terms, or in balancing the interests of labor and management. It is not the duty or responsibility of the courts to protect parties from improvident agreements or from the consequences of agreeing to perfectly clear language that they later contend is not what they meant.

The Seventh Circuit claimed that the Third Circuit had already "crossed the Rubicon" in this regard in the *SEPTA* case. Appendix A at 9a n.1. As is noted above, that case concerned the unique circumstance of secondary picketing of a commuter railroad in connection with a strike in an entirely different mode of transportation, and the court found a minor dispute based on the testimony of a management witness that he had been a poor draftsman. It found that although the sympathy strike clauses of the agreements at issue did not bar SEPTA employees from supporting the airline workers' strike, they could be read as if they did because that was what the management witness said he intended. 882 F.2d at 785-786.

BMWE submits that the *SEPTA* decision conflicted with the RLA and the decision in *Conrail,* but it could potentially have been limited to its highly peculiar facts of a sympathy strike on a commuter railroad in connection with an airline strike. Perhaps the *SEPTA* decision reflected the special treatment afforded commuter railroads under the RLA and its greater restriction on the use of self help on commuter lines. 45 U.S.C. § 159a. In any event, the rationale in *SEPTA* has now been extended to a garden variety railroad industry dispute where freight railroads made a minor dispute claim that was upheld even though it could not be sustained under either the express or implied terms of the parties' agreement. The adoption of the same interpretation of the RLA by the Seventh Circuit in reliance on the decision in *SEPTA,* forcefully demonstrates the need for this Court to grant BMWE's petition to direct the lower courts back to a proper interpretation of the RLA as was set forth in *Conrail.*

BMWE further submits that this case presents an excellent avenue for the Court to set the case law in this area back on track. As BMWE has shown, the District Court found that the language of the agreement "unambiguously" applied to all traveling employees, and that the Railroads' had essentially conceded that the contract language was clear as to its scope of application. Appendix B at 28a. The Court of Appeals did not disagree; it found the Railroad's interpretation to be "theoretically plausible" but with "no basis in the text", and "frivolous", if "interpretation stopped at the four corners of the agreement". Appendix A at 7a. Thus, this case straightforwardly presents the question of whether a minor dispute may be found when the relevant contract language is clear and unambiguous and can not arguably be read to support the carrier's contractual defense to the union's claim of unilateral change.

BMWE recognizes that reversal of the Seventh Circuit's decision would mean there would be the potential for disruptions of commerce in situations when labor and management are not able to resolve their differences and the carrier insists on a course of action that a court has determined to be contrary to clear contract language. However, as BMWE has noted, that possibility is part of the RLA scheme; it was designed to diminish potential disruptions of commerce by creating a bargaining process, but it was not designed to force compulsory arbitral resolution for disputes over changes in CBAs. *Shore Line*, 396 U.S. at 148; *Elgin, Joliet & Eastern*, 325 U.S. at 725; 45 U.S.C. § 157. Some may view that arrangement as bad labor policy; but, as Judge Wood observed (Appendix A at 20a-21a), that is an issue to be addressed by Congress. *See also Chicago & North Western Transp. Co. v. United Transp. Union*, 402 U.S. 570, 583-584 (1971). Congress' role in setting labor policy should not be assumed by the courts as, we respectfully submit, would occur if the decision below is allowed to stand.

CONCLUSION

For the foregoing reasons, BMWE respectfully urges the Court to issue a writ of certiorari to the Court of Appeals for the Seventh Circuit to review and reverse the judgment of that Court in *Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Ry. supra.*

Respectfully submitted,

Of Counsel:

WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 Evergreen Road
Suite 200
Southfield, MI 48076
(248) 948-1010

DONALD F. GRIFFIN
Assistant General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G Street, N.E.
Suite 460
Washington, D.C. 20001-1511
(202) 638-2135

RICHARD S. EDELMAN *
Of Counsel
O'DONNELL, SCHWARTZ & ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, DC 20036
(202) 898-1824
Attorneys for Petitioner

Date: July 2, 1998

* Counsel of Record

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4175

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff-Counter
Defendant-Appellee,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN RAILROAD COMPANY,
Sued as Burlington Northern Railroad,
CONSOLIDATED RAIL CORPORATION, *et al.*,
Defendants-Appellants,

and

NORFOLK SOUTHERN RAILWAY COMPANY and
NORFOLK AND WESTERN RAILWAY COMPANY,
Counter Plaintiffs-Appellants.

Appeal from the United States District Court
for the Central District of Illinois
Nos. 96 C 1515, 96 C 1524—Joe B. McDade, *Judge*

ARGUED FEBRUARY 28, 1997
DECIDED DECEMBER 22, 1997

Before CUDAHY, DIANE P. WOOD and EVANS, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The nation's major railroads unite in this appeal to confront the union of rail maintenance workers, the Brotherhood of Maintenance of Way Employees. The issue is the extent to which the railroads must compensate their maintenance workers for travel expenses; the governing instrument is the collective bargaining agreement (the "Agreement") of September 26, 1996. The union believes that the Agreement obliges the railroads to pay travel expenses for all "traveling employees." The railroads counter that they need only pay travel expenses for employees in roving "regional and system gangs."

For the most part, American labor law leaves the resolution of industrial disputes to the parties' own devices, subject to procedural safeguards of fairness. But the legal milieu for railroads and airlines is different. A strike that halted traffic along these arteries of commerce could traumatize the nation's economy. The specter of such labor unrest led Congress in 1926 to establish a two-track regime to govern the course of a dispute. Railway Labor Act ("RLA" or the "Act"), 44 Stat. 577, as amended, codified at 45 U.S.C. §§ 151-188; *see Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 562-66 (1930). Congress charged the federal courts with a seminal but limited role under this regime—that of taxonomist. Courts are to sort labor disputes into two piles, major or minor. Minor disputes are about enforcing rights already agreed upon in a contract. The only way to resolve a minor dispute is to go to binding arbitration; the Act forbids strikes over a minor dispute. *See Consolidated Rail Corp. v. Railway Labor Executives Ass'n,* 491 U.S. 299, 302-04 (1989). Major disputes are about creating new rights. The avenue for resolving this kind of dispute is ultimately open-ended. The disputants must first submit

to a long course of bargaining and mediation, during which they are obliged to preserve the status quo. But, if at the end the railroad and union have still not come to an agreement, the RLA steps out of the way, and the disputants may resort to raw "economic force." *See Conrail*, 491 U.S. at 303.

This dispute arose soon after the Agreement was concluded. The railroads insisted that they had no obligation to pay the travel expenses of employees beyond those in regional and system gangs. Within a month (October 24, 1996) the union had filed suit in the Central District of Illinois, requesting a declaration that the railroads had tried to amend the Agreement unilaterally, which is to say that the dispute was major. Four of the railroads counter-claimed, urging that the dispute was minor. (The District Court for the Western District of Virginia transferred a parallel proceeding brought by the remaining two railroads, Norfolk Southern Railway Co. and Norfolk and Western Railway Co., and the suits were consolidated.) The railroads sought a preliminary injunction against any strikes, work stoppages or picketing over the issue of travel expenses. The parties agreed to combine the hearing on the preliminary injunction with the trial on the merits. *See* Fed. R. Civ. P. 65(a)(2). The district court held that the dispute was major and ruled for the union. The railroads appeal. Our review is de novo. *Railway Labor Executives Ass'n v. Norfolk & W. Ry. Co.*, 833 F.2d 700, 706 (7th Cir. 1987).

The case turns on a question of interpretation: to which sources may a court look in interpreting a collective bargaining agreement under the RLA? We hold that a court may refer to the official, formal bargaining history when it construes an agreement under the RLA. We reverse.

I. History of the dispute over travel expenses

The controversy between the parties turns on two views of the classes of employees that are entitled to have their travel expenses reimbursed. The union takes the broader view—the Agreement encompasses all "traveling employees." A "traveling employee" is one whose work travels and who does not report to a fixed headquarters. An employee who commutes long-distance daily to a particular fixed site does not fit in this group. From what we can glean from the record, there are two kinds of traveling employees: those attached to district gangs, and those associated with regional and system gangs. The district gangs work within just one of the geographical units into which the railroads divide their workers, the seniority districts. Regional and system gangs, on the other hand, may traverse two or more seniority districts in the course of their work. Because the seniority districts can stretch over hundreds of miles, an employee from either a district gang or a regional and system gang may have to work a considerable distance from his or her home.

The history of the instant dispute reflects the unique legal setting of labor strife in the rail industry—a setting on which the disposition of this case depends. Railroad maintenance by its very nature demands that workers travel. The union, however, has bitterly opposed the use of regional and system gangs, which tends to impose an extraordinary travel burden on the gang members. The railroads refused to give up the regional and system gangs, and in 1991, the conflict impeded a negotiated agreement. With a strike looming, President Buch invoked the RLA, 45 U.S.C. § 160, to appoint Presidential Emergency Board No. 219 ("PEB 219"). PEB 219 investigated the discord and rejected the union's proposal to eliminate the regional and system gangs. The union opted to strike, but Congress intervened and imposed PEB 219's recommendations wholesale on the railroads

and the union. Pub. L. No. 102-29, 105 Stat. 169 (1991).

The 1991 agreement allowed for re-opening negotiations in November 1994. The issue of regional and system gangs got the limelight again as the union once more sought to cut them back. The contentious issue stalled agreement a second time. President Clinton appointed Presidential Emergency Board 229 ("PEB 229"), which issued its report on June 23, 1996 ("PEB 229 Rep."). Perhaps spurred by the memory of Congress' intervention in 1991, this time the railroads and the union averted a strike. With regard to travel expenses (the issue before us), the union and the railroads could not agree on implementing language. They chose instead to copy verbatim the pertinent recommendation of PEB 229 as Article XIV ("Travel Allowance") of the Agreement.

II. Article XIV viewed alone

We turn then to Article XIV to see whether the dispute is major or minor. The distinction hinges on whether old rights are being enforced or new rights created. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). Unsurprisingly, a railroad and a union often differ about classifying a particular dispute. Unions lean toward considering disputes major, and railroads the other way, because the chief consequence of pigeonholing a dispute as "major"—that a union may opt to strike or picket—grants the union considerable leverage over the railroads. In *Conrail*, the Supreme Court instructed how courts should sort disputes into the two piles. A suit is minor if the railroad's interpretation "is *arguably justified* by the terms of the parties' collective-bargaining agreement." *Conrail*, 491 U.S. at 307 (emphasis added). "Where, in contrast, the employer's claims are *frivolous or obviously insubstantial*, the dispute is major." *Id.* (emphasis added). That, then, is how we frame the question: is the railroads' reading of Article XIV as

applying only to regional and system gangs arguably justified, or is it frivolous or obviously insubstantial?

Were we to view Article XIV in a vacuum, we would conclude, as the district court did, that the railroads' position is feeble. Article XIV has two substantive sections, each pulled from PEB 229's report. The first section lays out a schedule of payments to workers based on distances traveled ($25 per 100 miles). The second provides the option of air transport for workers going more than 400 miles from their homes. Neither section defines which employees are to be covered. The first opens as follows:

> At the beginning of the work season[,] employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the carriers' service may place them hundreds of miles away from home at the end of each work week.

The second section is no more specific. The benefits for air travel, it states, accrue to "employees required to work over 400 miles from their residences."

The union says "employees" refers to all traveling employees (as defined above). The railroad says the term should be construed to cover only regional and system gangs. Either view is logically possible; neither is barred by the explicit terms of Article XIV. But while the term "employees" *could* refer solely to regional and system gangs, there is no hint in Article XIV that "employees" actually bears the narrower meaning. The railroads reply that Article XIV also gives a special allowance to employees "[a]t the start up and break up of a gang." Again, the hitch for the railroads is that the word "gang" could refer just to regional and system gangs, or to *both* district

gangs and regional and system gangs. The railroads propose a theoretically plausible distinction, but one that has no basis in the text. We would hold that railroads' view "frivolous or obviously insubstantial" and affirm the district court—if the act of interpretation were to stop at the four corners of the Agreement.

III. Bargaining history: the Presidential Emergency Boards

So the railroads' position would be frivolous, if we could not incorporate sources of meaning beyond the Agreement itself. But we can; in fact, we must. The Supreme Court long ago ruled that courts should interpret collective bargaining agreements with a keen eye for the nuances of context. "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees Union v. Union Pac. R.R. Co.*, 385 U.S. 160-61 (1966); *see also Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen*, 882 F.2d 778, 784-85 (3d Cir. 1989) ("*SEPTA*"). The assumptions courts make in reading a contract do not translate readily into the sphere of labor agreements. Contracts at common law are presumed to grow out of free choice, "in the sense that there is no real compulsion [for the parties] to deal with one another, as opposed to dealing with other parties." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Courts hold the parties to the letter of their contracts, because the parties affirmatively chose those words to structure a legal mini-universe out of the void. Collective bargaining agreements, in contrast, typically govern preexisting relationships not easily broken and remade. For each side, the real options are governance "by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength,

at any given moment of the contending forces. *Id.* Under these conditions, a labor agreement cannot be presumed to represent a true "meeting of the minds." *Conrail*, 491 U.S. at 317. A collective bargaining agreement thus falls into a different order of legal instrument from an ordinary contract. Rather, " 'it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.' " *Conrail*, 491 U.S. at 311-12 (quoting *Warrior & Gulf*, 363 U.S. at 578-79 (internal citation omitted)).

The notion of a "meeting of the minds" breaks down still further under the Railway Labor Act. The RLA takes as its "primary goal" "to settle strikes and avoid interruptions to commerce." *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 451 (1987). This goal imposes a heavy duty upon railroads and unions alike "to exert every reasonable effort . . . to settle all disputes.". 45 U.S.C. § 152, First. The RLA compels a railroad and a union to bargain, and to do so under the shadow of the emergency powers of the President and Congress. *See, e.g., Burlington Northern*, 481 U.S. at 452 (noting 1986 congressional intervention). Should the parties fail to agree to some text—any text—a real possibility exists of Congress' forcing its own solution. Under these circumstances, we cannot presume that the parties act at their peril if their wording is misleading, just as we would not read a statute or treaty as if the lawgiver or contracting powers drafted their text under strict liability.

The railroads and the union did not negotiate Article XIV in a vacuum, and we will not act as if they had. For collective bargaining agreements under the RLA, we must look beyond the document itself. We must look to the parties' "practice, usage and custom." *Union Pac. R.R. Co.*, 385 U.S. at 161. We must look to parallel labor agreements, even those involving other parties. *Id.* And in this case we must look to a portion of the barganing history. But such extrinsic evidence cannot be used to over-

ride the "express provisions of a written contract." *Brotherhood of Ry., Airline & S.S. Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403, 406 n.2 (7th Cir. 1988). The RLA may direct us to look beyond the agreement, but it does not free either party from the consequences of assenting to a text. Our purpose instead is to ascertain whether the ostensible meaning of Article XIV—lucid and definitive as it might seem—is in fact the right one. This is a court's responsibility to some extent even under contract law, where a court may unveil a latent ambiguity through extrinsic evidence. *Bank of the United States v. Dunn*, 31 U.S. 51, 54 (1832) (noting this exception to parol evidence rule); *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989); *DeKalb Bank v. Purdy*, 520 N.E.2d 957, 963 (Ill. App. Ct. 1988). A federal court must enjoy at least the same authority under the RLA. *See, e.g., SEPTA*, 882 F.2d at 783 (a court may look to "side letter agreements, policy statements and any other evidence of the intent of the parties which may properly be considered").[1]

Here the railroads point to a single slice of the bargaining history, the hearings and report of Presidential Emer-

---

[1] The dissent presents thoughtful policy arguments against considering any extrinsic evidence when the plain language of an agreement seems clear. But the Rubicon has been crossed by the Third Circuit in *SEPTA*. *See generally SEPTA*, 882 F.2d at 783-86. We would find it very difficult to maintain that the suggestion to consult extrinsic evidence, supported by Third Circuit precedent, is "frivolous or obviously insubstantial," *Conrail*, 491 U.S. at 307. The dissent also cites the views of a majority of the judges in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc), as persuasive authority against considering extrinsic evidence in this context. *See* Slip Op. at 15-16. *Bidlack*, however, dealt with the *merits* of a dispute under the National Labor Relations Act, and does not indicate that, in an RLA case, a suggestion to consult extrinsic evidence to uncover a latent contractual ambiguity is a *frivolous* legal argument. This does not mean, and we do not read *SEPTA* to suggest, that all forms of extrinsic evidence are entitled to equal, or even significant, weight.

gency Board 229. It is a particularly apposite slice for our purposes, because the negotiators took a chunk of PEB 229's report and inserted it word-for-word in the Agreement as Article XIV. The bargaining history hence is of a peculiar sort. There is a danger in opening the door too wide to extrinsic evidence, so that the next judge will have to confront illegible notes scribbled on a bar napkin, or testimony about the musings of coffee-sated negotiators at 2 a.m. But that danger is not present here. We have a manageable and definable set of documents, collected from an official hearing, from which the parties drew the language at issue in this case. If an ambiguity is asserted to exist beneath the surface of that text, we cannot believe that Congress would have us blind ourselves to what its original drafters meant to say.

In a moment we will consider what this extrinsic evidence reveals; but first we must explain why we cannot adopt the railroads' rationale for consulting it. The issue before us is whether the tussle over travel allowances is a major or minor dispute. The railroads say that the way to resolve this question is to ask what an arbitrator might do. If an arbitrator might rule for the railroads, then that's it —the dispute is minor and it must go to arbitration. That a court should put on an arbitrator's hat has some intuitive appeal. The content of an agreement depends as a practical matter on who is going to interpret it and how she will do so. If an agreements's drafters know that arbitrators will likely interpret things in way X (say, by looking at bargaining history) and not way Y, then that knowledge will inform what the drafters set down on paper and how they expect it to be seen.

Yet mimicking arbitrators is not what Congress commanded us to do. Congress committed the classification of RLA disputes to federal judges, not to arbitrators, and we have no warrant to cede that commission de facto. Nowhere do we find a suggestion by Congress or the Supreme

Court (or the inferior courts, for that matter) endorsing the railroads' proposal. This absence is telling, for the initial charm of the railroads' position dissolves on further inspection. The rulings of arbitrators are subject to judicial review of an especially narrow kind. *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914, 921 (7th Cir. 1985) ("Perhaps 'review' is a misnomer."). This brand of judicial review guards against only the arbitrator run amok. Arbitral awards that fall short of that berserk level, even if rash, foolish and ill-advised, must stand. They thus would make a poor source of law for courts to tap in distinguishing major and minor disputes. (Though facially neutral, the railroads' attempt to elide the major/minor test with the judicial review test would work to their favor. The railroads would define a minor dispute as anything fitting into the gamut of arbitral awards that can survive judicial review. Given the deference paid even to slapdash awards, the class of major disputes would dwindle to meager proportions indeed.) To pin judicial rulings to the vagaries of nearly unconstrained awards would also suffer from a subtler but perhaps graver defect. For the classification of RLA disputes, the railroads would have us put the cart before the horse. It is for the judges to say what the law is, not for the arbitrators. The tether that binds arbitrators to judicial rulings may be a loose one, but the pull is from the judges to the arbitrators, not the other way around.

But even if for the wrong reasons, the railroads are right: the district court should have examined the bargaining history of PEB 229. That history comprises the Presidential Emergency Board's report and the parties' written and oral submissions. There the railroads claim to find proof positive that when the PEB drafted the future Article XIV, the Board thought that the union's overarching concern was regional and system gangs. With this we readily agree. When PEB 229 pronounced its understanding of the union's general contentions, it explicitly linked the issue

of travel allowances to regional and system gangs, not all traveling employees. [JA-0362]. The PEB also explained the union's specific proposal on travel allowances in terms of regional and system gangs [JA-0369].[2] In several instances the union itself straightforwardly framed the issue of travel allowances around the regional and system gangs. The starkest example was the presentation to the PEB by the union's director of arbitration. He began by "set[ting] forth three fundamental proposals." "Here is what we are after, here is what the [union] wants out of this proposal," he said. The first two requests had to do with meals and lodging; the third with travel allowances. "Third, we believe maintenance-of-way employees should not be required to subsidize the carriers' most productive gangs, its re-

---

[2] The disent observes that "[t]he recommendations regarding travel allowances and those regarding regional and system gangs are in wholly separate sections (sections 7 and 10, respectively)" of part VI of PEB 229's report. Slip Op. at 18. Part V of the report describes "The Parties' Contentions," and part VI contains PEB 229's "Recommendations." Section 7 of part V deals with "expenses away from home," and includes the following language about travel expenses: "BMWE [the union] contends that . . . maintenance of way employees subsidize the Carriers' regional and system gangs with staggering amounts of unpaid travel time and unreimbursed automobile expense for travel between their homes and distant work locations." PEB 229 Rep. at 10, JA-0369. The union's position on meal and lodging allowances is also discussed in this section. Section 10 of part V, covering "regional and system-wide production gangs," discusses the union's position on the minimum size of regional and system-wide gangs and various other rules relating to such gangs, but does not include any discussion of meal, lodging or travel expenses. PEB 229 Rep. at 12, JA-0371. The possibility that, in part VI, the drafters would choose to discuss a recommendation for travel reimbursements (exclusively) for regional and system gangs under the heading "expenses for meals and lodging and travel allowance" (section 7)—along with other topics such as meal and lodging *reimbursements*—rather than under the heading "regional and system-wide production gangs" (section 10)—along with various *rules* pertaining to such gangs—is not so remote as to significantly undermine the railroads' proposed interpretation of the disputed provision.

gional and system gangs, by traveling long hours without pay or travel expense to work on the gangs." [JA-0646]. Uncompensated travel time for regional and system gang members in particular came up again when the union's general counsel addressed the PEB. [JA-0628, 0634, 0635]. There are further instances we might repeat, but the point is made. [JA-0442, 0568, 0572].

From this the railroads would have us infer that the PEB's recommendation about travel allowances referred strictly to regional and system gangs. This one is harder to swallow. The PEB's recommendation is, of course, silent on this point. The railroads' submissions to the PEB themselves do not support their case: they sometimes speak in the broad language the unions urge today, as if allowances for all traveling employees were at stake. [JA-0661-63; 0673-78; 0714; 0726-27]. The union's brief to the PEB on "Expenses Away from Home" seems to encompass all traveling employees on the issue of travel allowances, albeit with some ambiguity. [JA-0411, 0414; but see JA-0444].

That the PEB's recommendations, as swept into Article XIV of the Agreement, referred to all traveling employees (and not just regional and system gangs) seems to us plausible, maybe even probable. For the union to prevail under the RLA, however, the evidence must do more than tilt; it must slide into a heap on one side. *Railway Labor Executives Ass'n v. Norfolk and W. Ry. Co.*, 833 F.2d at 705 ("Because a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor."); *see also General Comm. of Adjustment, United Transp. Union, W. Md. Ry. Co. v. CSX R.R. Corp.*, 893 F.2d 584, 591 (3d Cir. 1990) ("close cases" to be treated as minor). The evidence is not so lopsided. Based on what the PEB said and how the parties had cast their views before it, we think that a latent ambiguity may exist in the Agreement, namely that the PEB meant only to refer to regional and system gangs. The railroads' inter-

pretation therefore is "arguably justifiable" and not "frivolous." *See Conrail*, 491 U.S. at 320 (noting employer bears only "light burden" in establishing arbitral jurisdiction, the meeting of which in "no way" suggests employer "is entitled to prevail before the Board on the merits of the dispute"). The dispute is minor and the judgment of the district court is REVERSED. The case is REMANDED with directions for the district court (1) to dismiss the union's suit (Dist. Ct. No. 96 C 1515) for lack of subject matter jurisdiction, and (2) to enter judgment for Norfolk Southern Railway Co. and Norfolk and Western Railway Co. on their suit (Dist. Ct. No. 96 C 1524) for declaratory and injunctive relief.

DIANE P. WOOD, *Circuit Judge*, dissenting. No one would say that the distinction between major disputes and minor disputes created by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, is easy to draw, even after the Supreme Court's effort to provide guidance in *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989) (*Conrail*). But draw it we must, no matter how preferable a system in which all disputes were referred to binding arbitration might be from the standpoint of preserving industrial peace and keeping the major arteries of interstate and international commerce open. While there is much in the majority's opinion with which I am in full agreement, I respectfully disagree with its ultimate conclusion that the district court was wrong to characterize the dispute now before us as "major." I would affirm Judge McDade's decision and leave the parties to resolve their differences through the bargaining process.

As the majority rightly notes, this case turns on the principles of interpretation we apply to the task of characterizing the dispute as major or minor. The Supreme Court explained the difference between the two in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945):

> [The major dispute category] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> * * * *
>
> [The minor dispute category] contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Id. at 723. In our case, a collective bargaining agreement plainly exists, but that alone is not enough to make the dispute minor. If the Railroads are trying to "change the terms" of that agreement, rather than to interpret the agreement they have, then the dispute is still major. Still, under *Conrail,* it is not hard for the Railroads to show that they fall on the "interpretation" side of that line, for a "dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement." 491 U.S. at 307. A dispute is major only where "the employer's claims are frivolous or obviously insubstantial." *Id.*

I agree entirely with the majority's reasons why a court charged with deciding whether a dispute is major or minor should not attempt to put itself in the position of a potential arbitrator. See Majority Op. at 10-11. To what, however, may we look to decide whether the Railroads' position on the agreement is "arguably justified"? The answer turns in large part on our understanding of the Supreme Court's decisions in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960),

and *Transportation-Communication Employees Union v. Union Pacific Railroad*, 385 U.S. 157 (1966). In both of those cases, the Court pointed out that a collective bargaining agreement is not an ordinary contract, but instead a generalized code that creates a common law for a particular industry or plant. *Steelworkers*, 363 U.S. at 578-79; *Transportation Union*, 385 U.S. at 160-61. In *Transportation Union*, the Court went so far as to say that

> [i]n order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.

Id. at 161. What is unclear from this language, however, but is critical here, is whether this rule applies even if the collective bargaining agreement is absolutely unambiguous and complete with respect to the disputed issue, or if, on the other hand, some (low) threshold of ambiguity must be passed before resort to extrinsic evidence is proper.

This court, sitting *en banc*, has already had occasion to speak to this issue in the closely related situation of collective bargaining agreements governed by the National Labor Relations Act. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (*en banc*). There we held as follows:

> [T]here must be either contractual language on which to hang the label of ambiguous or some yawning void, as in [*Wood v.*] *Duff-Gordon* [222 N.Y. 88, 118 N.E. 214 (1917)] . . . that cries out for an implied term. Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them.

Id. at 608 (opinion of Posner, J.); see also *id.* at 616 (opinion of Easterbrook, J.) ("[E]xtrinsic evidence cannot create an ambiguity in otherwise clear documents."); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1187

(7th Cir. 1994) (recognizing that the opinions of Judges Posner and Easterbrook in *Bidlack*, taken together, represent the view of a majority of the court on this point). The context of the *Seeelworkers* and *Transportation Union* decisions does not suggest that extrinsic evidence may be used to contradict explicit terms of a collective bargaining agreement. *Transportation Union* held only that in a jurisdictional dispute over work assignments, all interested unions and parties must be before the Railway Adjustment Board at one time; otherwise there is a risk of *seriatim* results that more resemble the blind men's description of the elephant than rational decisionmaking. *Cf. Transportation Union*, 385 U.S. at 164-66. *Steelworkers* added that the common law of the shop may be used to fill in gaps in a collective bargaining agreement. See *Steelworkers*, 363 U.S. at 580. Neither case comes close to saying that extrinsic evidence may be used to contradict the plain language of an agreement when that subject has in fact been unambiguously addressed by the parties. Such a rule would open the door to evidence of secret understandings and side-deals that were never made known to the rank-and-file union membership, which this court has found would be a serious abuse of the collective bargaining process and thus inconsistent with national labor policy. See *Merk v. Jewel Food Stores*, 945 F.2d 889 (7th Cir. 1991).

That type of risk is precisely why I disagree with the majority's approach here. After reviewing the agreement, the majority concludes that the Railroads' view is frivolous or obviously insubstantial if one looks only at the agreement's four corners. Majority Op. at 6. So far, so good. Both the language of Article XIV of the agreement, which deals with the subject of travel allowances, and the agreement taken as a whole, support this conclusion. Article XIV makes no distinction between employees who travel with a "district gang" and those who travel with a "regional and system" gang. Either type of gang can travel

considerable distances, as the majority notes and as the record amply demonstrates. See Majority Op. at 3-4. Article XIV sets forth a minimum travel allowance that increases depending on the round-trip distances traveled by the gang, which basically gives an allowance of $25 for each 100 miles traveled after the first 100. Literally two pages later, the agreement turns to the subject of "production gangs," in Article XVI. In contrast to Article XIV, Article XVI contains language specifically addressing the issue of the regional or system-wide gangs. Thus, as we all agree, it is practically impossible in the face of this language to conclude that the Article XIV travel allowances are payable only to members of regional and system gangs, rather than to all employees who travel the prescribed distances.

Despite recognizing this textual clarity, the majority turns to the bargaining history of the collective bargaining agreement, which is reflected to a considerable degree in the submissions the parties made before the Presidential Emergency Boards (PEBs) that developed the language eventually incorporated in the agreement. In so doing, the court confusingly seems to draw a line between acceptable extrinsic evidence (*i.e.*, the PEB submissions) and unacceptable extrinsic evidence ("illegible notes scribbled on a bar napkin" or the "musings of coffee-sated negotiators at 2 a.m."). Majority Op. at 9. I suspect this line will be harder to maintain than the majority believes, particularly when we look to the experience of other circuits and evidence parties have tried to introduce in our own court. See, *e.g.*, *Southeastern Pennsylvania Transp. Auth. v. Brotherhood of R.R. Signalmen*, 882 F.2d 778, 785-86 (3d Cir. 1989) (referring to testimony of chief officer of labor negotiations for SEPTA about which parts of the agreement he initially drafted and what he really meant); *Central States, S.E. & S.W. Areas Penson Fund v. Central Cartage Co.*, 69 F.3d 1312, 1316 (7th Cir. 1995) (court rejects proffer of testimony from union negotiator on

question whether casual drivers would be covered only if they were union members). Once the door is open to extrinsic evidence, courts will need to consider whatever the parties put forward, for whatever it may be worth.

Although I would not resort to the PEBs or other extrinsic evidence in the absence of a finding of some ambiguity or vagueness in the agreement, see *Bidlack*, 993 F.2d at 608, I note that in any event the evidence from the PEB on which the majority relies does not logically undermine the plain language of this contract. PEB 229 divided its recommendations, which formed the basis for the agreement before us, into separate sections. The recommendations regarding travel allowances and those regarding regional and system gangs are in wholly separate sections (sections 7 and 10, respectively). Section 7, entitled "Expenses for Meals and Lodging and Travel Allowance," begins by recommending a travel allowance for "employees who are employed in the maintenance of way crafts who regularly are required throughout the work week to live away from home." Subsection (b) of the same part opens with the following statement:

> At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the Carriers' service may place them hundreds of miles away from home at the end of each work week. Accordingly, the Carriers will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip[.]

Both parties agree that many employees other than those in the regional and system gangs are required to travel great distances.

In the end, the slender reed on which the Railroads have pinned their hopes is evidence tending to show that

the union negotiators made it clear to the PEBs that their primary concern was with members of the regional and system gangs. Even if we believe this was true, however, it in no way indicates that the negotiators were *disclaiming* an interest in the other employees who needed to travel. It is not unusual in negotiations to point to one's strongest example of a problem, while at the same time seeking language that would cover a broader constituency. I am therefore unconvinced even looking to the PEB evidence that the Railroads have found anything to make "arguably justified" their reading of Article XIV as providing travel allowances only for regional and system gang members.

I would expect employers always to argue that they are "interpreting" an agreement rather than trying to change its terms, so that they would receive the considerable benefits that attend characterization as a minor dispute. It is the court's responsibility, however, to draw the line between interpretation and change. That task in turn requires the court first to decide what the agreement covers and what it does not. If every word in the English language required interpretation with the use of extrinsic evidence, the distinction between interpreting an agreement and changing it would vanish. I am not so pessimistic about the ability of words to convey meaning, nor do I think the "plain meaning" concept plays no role whatsoever in the context of collective bargaining agreements. On this record, I agree with the district court that the Railroads are trying to obtain a new and materially different travel allowance article in the agreement—one that will provide allowances only for the regional and system gang members rather than the one they now have, which on its face covers all employees. Because I see no ambiguity or vagueness either in the pertinent article of the agreement or in the context of the agreement as a whole, I would not resort here to extrinsic evidence at all. Even if I did look to the PEB history, I would still find this is a major dispute. Whether that is a good thing or a bad thing for

national labor policy I am not qualified to say. But it is the statutory system Congress has given us in the Railway Labor Act, and I respectfully suggest we must follow it even when the result is the identification of a major dispute. I therefore dissent from the majority's judgment.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Filed Dec. 17, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 96-1515

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff,
v.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., *et al.*,
Defendants.

Case No. 96-1524

NORFOLK SOUTHERN RAILWAY CO., *et al.*,
Plaintiffs,
v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
et al.,
Defendants.

ORDER

On December 13 and 16, 1996, this Court held an evidentiary hearing in these consolidated cases on the Carriers' motions for preliminary injunction. At such hearing, the parties agreed that the Court could decide this case on the merits pursuant to Fed. R. Civ. P. 65(a)(2). After hearing the testimony and argument for both sides, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are largely undisputed by the parties. Brotherhood of Maintenance of Way Employes ("Union") has a long and contentious bargaining history with the various Carriers involved in this case. One of the most divisive issues separating the parties in recent years has been the use of "regional and system gangs" which operate across railroad seniority district lines. Each railroad company has a number of seniority districts or divisions [1] which define the geographical boundaries in which a railroad employee can work. Many "travelling" or "mobile" employees travel within a single seniority district when reporting to work. Seniority districts vary in size and can span over a thousand miles at their farthermost regions. The work is mostly seasonal and takes place at specified times during the year.

"Regional and system gangs" consist of a subset of these workers who are authorized to travel through *two or more* seniority districts in order to arrive at their job site. This may entail more travel for employees to and from their homes, although not in every instance. The Union deplores regional and system gangs in part because of the sometimes extraordinary distances employees must travel in order to arrive at their worksites as well as the fact that these gangs are subsidized with "staggering amounts of unpaid travel time and unreimbursed automobile expense for travel between their homes and distant work locations."

Because the Carriers insisted on the inclusion of regional and system gangs in their 1991 collective bargaining agreement, the parties were unable to reach an accord. As a result, President Bush appointed Presidential Emergency Board No. 219 ("PEB 219") in order to make

---

[1] It is unclear precisely what difference there is between a "district" or "division." For purposes of this opinion, the Court shall simply refer to them collectively as "districts."

recommendations on the issues dividing the parties. However, the Union rejected the PEB's recommendations and instituted a nationwide railroad strike. Congress intervened by imposing the PEB 219 recommendations on the parties as a collective bargaining agreement under the RLA. Thus, the 1991 National Agreement included certain provisions for regional and system gangs.

The 1991 National Agreement allowed the parties to serve "reopeners" on November 1, 1994, that is, to propose changes to the agreement and bargain over them. The Union immediately pushed for the elimination of regional and system gangs. In addition, the parties disagreed over the amount of travel allowances for employees. On May 16, 1996, President Clinton appointed PEB No. 229 ("PEB 229") to make recommendations on these and many other issues. The Union and Carriers made written submissions to the Board and followed that up with oral testimony before the Board.

On June 23, 1996, PEB 229 issued a Report recommending that regional and system gangs not be eliminated, but that their use be restricted to those Carriers which already utilized such gangs. On page 34 of that same Report, the PEB made the following recommendation regarding travel allowances for employees:

> At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the Carriers' service may place them hundreds of miles away from home at the end of each work week. Accordingly, the Carriers will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip:

0 to 100 miles	$ 0.00
101 to 200 miles	$ 25.00
201 to 300 miles	$ 50.00
301 to 400 miles	$ 75.00
401 to 500 miles	$100.00

Additional $25.00 payments for each 100 miles increments.

At the start up and break up of a gang, an allowance will be paid after 50 miles, with a payment of $12.50 for the mileage between 51 and 100 miles.

Carriers may provide bus transportation for employees to their home area on weekends. Employees need not elect this option.

For employees required to work over 400 miles from their residences the Carrier shall provide, and these employees shall have the option of electing, an air travel transportation package to enable these employees to return to their families once every three weeks. Ground transportation from the work site to the away from home airport shall be provided by each Carrier, and on the return trip the Carrier shall provide ground transportation from the away from home airport to the lodging site. In dealing with programmed work, the employees and Carrier may know how long the employees will be required to work beyond the 400 mile range, and the employer can require the employees to give advanced notice of their intent to elect the air transportation option so that the Carrier may take advantage of discounted air fares. Employees must make themselves available for work on at least ninety percent of the regularly scheduled work days during the three week period. And, they will not qualify for the previously set forth travel allowance during the three week period. They shall however be entitled to meals and lodging during the two away-from-home weekends in the three-week cycle.

On September 26, 1996, the parties entered into a new National Agreement based on the PEB's recommendations. Because the parties could not agree on specific implementing language, the travel allowance recommendation was incorporated verbatim into Article XIV of the Agreement.[2]

Soon after, the Carriers were insisting that Article XIV should be interpreted as applying only to regional and system gang employees. On October 24, 1996, the Union filed suit before Judge Baker in Case No. 96-1515 seeking a declaration that the Carriers were attempting to unilaterally amend the terms of Article XIV in violation of the RLA.[3] On November 11, 1996, Judge Baker recused himself and transferred the case to this Court. On November 22, 1996, four of the Carriers filed counterclaims urging that the dispute was a minor one subject to compulsory arbitration under the Act. On November 26, 1996, they filed a motion for preliminary injunction.

Meanwhile, on November 8, 1996, two of the other Carriers, Norfolk Southern Railway Co. and Norfolk and Western Railway Co., filed their own Complaint for declatory and injunctive relief against the Union in the United States District Court for the Western District of Virginia. That same day, these Carriers also filed a motion for TRO against a threatened Union strike, which the Court granted on a $100,000 bond. The court then transferred the case to Judge Baker. Judge Baker transferred it to this Court, and it was docketed as Case No. 96-1524. On December 2, 1996, Defendants filed a Motion for Preliminary Injunction in that case.

On December 5, 1996, the Court consolidated the two cases and set the matter for a hearing on both pending

---

[2] Only the section numbers were changed and the last sentence of section 2 was eliminated.

[3] An Amended Complaint was filed on November 4, 1996.

preliminary injunction motions and on the merits of all claims and counterclaims. On December 13 and 16, 1996, such a hearing was held and the Court took the matter under advisement.

CONCLUSIONS OF LAW

The question before the Court is straightforward: is the Carriers' position that Article XIV applies only to regional and system gang employees a major or minor dispute under the RLA? All disputes under the RLA fall into one of these two basic categories. *See Consolidated Rail Corp. v. Railway Labor Executives' Assoc.*, 491 U.S. 299, 310 (1989) (refusing to add a third category of "hybrid" disputes).

Major disputes relate to "disputes over the formation of collective agreements or efforts to secure them." *Id.* at 302. They arise when there is no collective bargaining agreement in place or where one party seeks to unilaterally amend the provisions of an existing agreement. *Id.* In the event of a major dispute, the parties are required to undergo a lengthy process of bargaining and mediation. Until they have exhausted those procedures, the parties are obligated to maintain the status quo, and the employer may not implement the contested changes. *Id.* at 302-03. If the carrier fails to make every reasonable effort to settle a major dispute, the Union may strike to achieve the status quo. *Burlington Northern R.R. Co. v. United Transp. Union*, 862 F.2d 1266, 1281-82 (7th Cir. 1988); 29 U.S.C. § 108.

By contrast, minor disputes "aris[e] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 152, Sixth. Thus, a minor dispute is one over the interpretation or application of an existing collective bargaining agreement. *Chicago & North Western v. Railway Labor Execs. Ass'n*, 908 F.2d 144, 148 (7th

Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Burlington Northern R.R. Co. v. United Transp. Union*, 862 F.2d 1266, 1271 & n.4 (7th Cir. 1988). If there is any doubt as to whether a dispute is major or minor, a court will construe the dispute to be minor. *Burlington Northern*, 862 F.2d at 1272. The procedure for resolving a minor dispute is binding arbitration before the National Railroad Adjustment Board or a special adjustment board, *Chicago & North Western*, 908 F.2d at 148; *Burlington Northern*, 862 F.2d at 1272 *citing Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957); 45 U.S.C. § 153, and a district court is justified in enjoining any threatened strikes pending its outcome. *Burlington Northern*, 862 F.2d at 1272; *Chicago & North Western*, 908 F.2d at 157.

The Supreme Court has created a special test for the situation where a carrier believes that it is operating within the terms of the collective bargaining agreement, but the Union asserts that the carrier is attempting to unilaterally amend the CBA. The ensuing dispute is minor if the action is "arguably justified by the terms of the parties' collective bargaining agreement." *Consol. Rail*, 491 U.S. at 307. Where, in contrast, the Carriers' claims are "frivolous or obviously insubstantial," the dispute is major. *Id.* Thus, the Carriers have a "relatively light burden" in establishing that a dispute falls under the exclusive arbitration provisions of the RLA. *Id.*

While this burden may be light, the Court finds that the Carriers have not met it here. The Court finds, and the Carriers appear to concede, that the plain language of Article XIV of the CBA unambiguously applies to *all* travelling employees. The first sentence of section 1(a) refers to "work season employees." However, it is undisputed that work season employees are not limited to regional and system gang employees. The next two sentences note that the initial reporting location "could be hundreds

of miles from their residences" and go on to state that these employees may be "hundreds of miles from home at the end of each work week." However, this is just as true for employees who travel within a single seniority district as for regional and system gang employees because single districts can span hundreds of miles. The fourth sentence plainly states that "the carriers will pay *each employee* a minimum travel allowance," thus implying that no restriction exists as to the particular type of employee.

While section 1(b) mentions "the start up and break up of a *gang*," there is no evidence in the record that the word "gang" applies only to regional and system gangs. On the contrary, the documentary evidence reveals that the words "gang" and "crew" are interchangeable and loosely applied. *See, e.g.*, Joint Ex. 4, p. 34 ("regional and system crews"); Union Ex. 2, p. 1241 ("travelling gangs"). Moreover, regional and system gangs have been characterized as "the carriers' *most productive gangs*," implying that other types of gangs exist. Joint Ex. 8, p. 318. Indeed, PEB 219 defined regional and system gangs as those consisting of at least 20 employees; thus, there must be "gangs" with less than that number of workers. The isolated use of the word "gang" in one subsection of Article XIV simply is not enough to sustain a textual argument here.

Likewise, section 2 of Article XIV simply states that employees required to work over 400 miles from their homes will have the option of electing an air transportation package between work and home. The third sentence refers to "programmed work" which has been defined as "scheduled work." While work schedules for regional and system gangs are more frequently published by the Carriers than for single district employees, they are in no way limited to such gangs. Moreover, the third sentence of section 2 does nothing to limit the scope of that sec-

tion. It merely provides that in specific instances of programmed work, the employee should inform the Carrier in advance that he is choosing to travel by air so that the Carrier can obtain competitive rates on the airline.

The Carriers argue that the plain language is ambiguous because it does not contain any reference to "travelling" or "mobile" employees or those employees "without fixed headquarters." However, such technical references are not necessary here. The broad language of Article XIV applies to all employees who travel between their worksite and their homes during the work season. This language necessarily encompasses travelling and mobile employees. Thus, the Carriers' position is clearly not justified by the plain language of the Agreement.

Instead, the Carriers argue that the Court must look to the entire context of Article XIV, including the development of that provision through the PEB 229 proceedings, to truly determine whether their position is "arguably justified by the terms of the collective bargaining agreement." *Consol. Rail,* 491 U.S. at 307. The Supreme Court in *Consolidated Rail* set forth two basic types of evidence upon which the Court could rely in making such a determination: (1) the express terms of the CBA; and (2) the implied terms of the CBA, as interpreted in light of the parties' practice, usage, and custom. *Id.* at 311. Thus, in *Consolidated Rail* itself, the Court relied upon an implied term of the CBA regarding drug testing, as interpreted in the light of past practice, to find that the dispute was a minor one. *Id.* at 312.

Here, however, this type of evidence is not available to the Carriers. As noted above, Article XIV does not provide any arguable basis for limiting its express terms to include regional and system gang employees only. Nor have the Carriers demonstrated that Article XIV's terms are implicitly restricted here. The Carriers' evidence regarding the PEB proceedings which resulted in the crea-

tion of Article XIV does not qualify as an implied agreement or a past practice, usage, or custom of the parties.

The Carriers make three further attempts to establish a past practice here. First, they argue that the Union has conceded that this dispute is a minor one by submitting individual grievances over Article XIV travel allowances to arbitration. However, Union Assistant to President, Steven V. Powers, testified that the Union arbitrated such individual grievances in order to protect the rights of its employees, but did not concede that the travel allowance dispute was a minor one. Thus, this argument must be rejected.

Second, NLRC Labor Relations Director A. Kenneth Gradia stated that "[t]he PEB travel allowance recommendation was modeled in good measure on language found in local agreements between carriers and the BMWE that provide travel allowances for members of regional and system gangs." Gradia Declaration ¶ 19, Ex. 23. It is true that the agreement found at Exhibit 23 includes a travel allowance chart similar in kind to that found in Article XIV of the parties' 1996 National Agreement. However, there is nothing in such a chart that inherently restricts its scope to that of regional and system gangs; indeed, it makes sense to use this type of chart in any situation where the amount of the allowance increases proportionally with the distance travelled. Moreover, the agreement at Exhibit 23 explicitly restricts its scope to "interdivisional gangs" and must be contrasted with the broad language used in Article XIV of the 1996 National Agreement.

Third, the Carriers argue that in the past, the amount of travel allowances for regional and system gangs on certain railroads has been disparately greater than that of other work gangs. Indeed, this was one of the points raised by the Union in its written submission to PEB 229:

> [T]he allowances are wholly inadequate and widely disparate between carriers. For example, BN employes assigned to regional production gangs receive a $20.00 weekly travel allowance and employes on other BN gangs receive no travel allowance. CSX employes assigned to system production gangs receive a weekend travel allowance of $50.00 and employes on other CSX gangs receive no travel allowance. Conrail has a sliding scale of $20.00, $24.00 and $28.00 for weekend trips, depending on the type of gang.

Joint Ex. 4, p. 21 n. 14. Thus, according to the Carriers, this past practice of the parties establishes an implied restriction of Article XIV's terms to that of regional and system gangs only.

However, the Court does not believe that the Carriers can rely solely upon past practices to change the otherwise unambiguous language of the Agreement. *Consolidated Rail* does not support such a result. In that case, the parties had conceded that an implied contractual term existed, and the Court refused to answer the question when "a particular past practice has risen to the level of an implied contractual term." 491 U.S. at 312 n.9. The law in this Circuit appears to be that reliance upon past practice is appropriate where a contractual term is silent on a particular issue or is ambiguous as to that issue or where it makes explicit reference to such practices. *See Judsen Rubber Works, Inc. v. Manufacturing, Prod. & Serv. Workers Union Local No. 24*, 889 F. Supp. 1057, 1062-64 (N.D. Ill. 1995). The law of the shop cannot be used to modify the clear and unambiguous language of the collective bargaining agreement. *I.A.M., Progressive Lodge No. 1000 v. General Elec. Co.*, 865 F.2d 902, 906 (7th Cir. 1989); *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionary and Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987). Because Article XIV unambiguously applies to all travelling employees,

it would be frivolous to use the Carriers' past practices to attempt to limit its broad language to regional and system gangs only.

This is even more clear in the instant case where the "past practice of the parties" actually appears to have been a *unilateral* practice by the Carriers to deprive certain employees of their travel allowances under vehement protest from the Union. Such a practice did not result from a joint determination of the parties and cannot properly be used to displace the explicitly negotiated provision in the parties' collective bargaining agreement. *Chicago Web Printing Pressmen's Union No. 7 v. Chicago Newspaper Publishers' Ass'n*, 772 F.2d 384, 387-88 (7th Cir. 1985); *Judsen*, 889 F. Supp. at 1062-63; *cf. Consolidated Rail*, 491 U.S. at 312 (past practice could be used to support employer's amendment of implied contractual term where Union *acquiesced* to the carrier's practice). Application of such a practice would result in a rewriting of Article XIV, not an interpretation of it.

The Carriers argue that the Court should look beyond the unambiguous language of Article XIV because arbirators have the ability to do so. For this proposition, the Carriers rely upon *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1279-80 (11th Cir. 1982), in which the Eleventh Circuit upheld an arbitration panel's decision to look beyond the plain language of the CBA in order to determine the parties' true intent. The court noted that "[p]erhaps this is not the result that a judge, applying ordinary principles of contract construction, would have reached." *Id.* at 1280.

Loveless is entirely distinguishable, as it involved the highly deferential review a district court must give to final arbitral awards under section 3, First (q) of the RLA. *Id.* at 1275, 1280. Under that standard, a court must merely determine whether the arbitrator's decision "draws its essence from the letter or purpose of the col-

lective bargaining agreement" and "conform[s] to a specific contractual limitation upon his authority." *Id.* at 1276.

Here, by contrast, the issue is in a decidedly different procedural posture. The Court must decide whether the Carriers' position is so "frivolous" or "obviously insubstantial" as to not warrant compulsory arbitration under the RLA. Because this is a federal court bound by the common law rules of contract, it could not in good conscience simply choose to ignore the plain and unambiguous language of the parties' agreement as an arbitrator might do. *GNB Battery Tech., Inc. v. Gould, Inc.*, 65 F.3d 615, 621 (7th Cir. 1995). When faced with a similar situation, Judge Zagel succinctly stated:

> *Loveless* [] involved an arbitrator's authority once a dispute was properly before him. In our case, however, we must address the logically prior question of whether this dispute properly should be before the adjustment board; and in this context we think it would make little sense to consider the material the adjustment board would consider in the event we decide the matter is within the adjustment board's exclusive jurisdiction.

Air Line Pilots Assoc., Int'l v. UAL Corp., 699 F. Supp. 1309, 1331 n.4 (N.D. Ill. 1988), *aff'd in part, rev'd in part*, 874 F.2d 439 (7th Cir. 1989).[4] Thus, the court refused to employ extrinsic evidence to change the plain meaning of an unambiguous clause in the CBA. *Id.* at 1331.

The Carriers raise the interesting point that it should be the arbitrator's decision in the first instance whether to look beyond the unambiguous language of the agreement.

---

[4] While the Seventh Circuit affirmed the district court's finding of a major dispute on wholly different grounds, Judge Zagel's reasoning still retains its force here.

However, the Court does not believe that it should place itself in an arbitrator's shoes when determining if the Carriers' position is "arguably justified." The Court is not itself an arbitrator and need not speculate what a particular arbitrator might do if faced with the same situation. Such an approach would diminish the rule of law which this Court is bound to follow in reaching its decisions. Nothing in *Consolidated Rail* or its progeny dictates a contrary holding.

Thus, in summary, the Court holds that because no express or implied terms of Article XIV, as viewed in light of the past practices of the parties, provide an arguable justificaton for the Carrier's position here, the dispute is a major one and Counts I and II of the Union's Complaint in 96-1515 are meritorious.[5] Conversely, the Carriers' claims in 96-1524, counterclaims in 96-1515, and preliminary injunction motions in both cases are denied. The Court finds that the Carriers have violated Section 2, First, and Section 2, Seventh, of the RLA by unilaterally amending Article XIV of the September 26, 1996 National Agreement in a manner inconsistent with Section 6 of the RLA.

The Carriers have made a motion to issue a strike injunction pending appeal in this case. Such an injunction is warranted under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a) if the movant can show irreparable harm. Here, the parties have stipulated that the Carriers will suffer irreparable injury in the event that the Court finds for the Union in this case. Thus, the Carriers' motion for injunction pending appeal is granted.[6] The precise word-

---

[5] The parties voluntarily dismissed Counts III and IV of the Union's Complaint in 96-1515 by stipulation on December 13, 1996. In addition, the Plaintiffs in 96-1524 voluntarily withdrew their claims relating to Article XII of the CBA [Doc. #44].

[6] The Court notes that nothing in the Norris-LaGuardia Act prevents such an injunction from being issued. *See Chicago & North*

ing of such an injunction and the amount of the supersedeas bond shall be determined as soon as practicable.

CONCLUSION

IT IS THEREFORE ORDERED that the Clerk shall enter a final judgment in favor of Plaintiff and against Defendants on Counts I and II of the Amended Complaint in Case No. 96-1515 [Doc. #3]. Defendants' counterclaims in Case No. 96-1515 [Doc. #20] are DENIED.

IT IS FURTHER ORDERED that Defendants' Motion For Preliminary Injunction in Case No. 96-1515 [Doc. #23] is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Temporary Restraining Order in Case No. 96-1515 [Doc. #29] is DENIED.

IT IS FURTHER ORDERED that the Clerk shall enter a final judgment in favor of Defendant and against Plaintiffs in Case No. 96-1524.

IT IS FURTHER ORDERED that Plaintiffs' Motion For Preliminary Injunction in Case No. 96-1524 [Doc. #6] is DENIED.

IT IS FURTHER ORDERED that the Temporary Restraining Order in Case No. 96-1524 [Doc. #2] is DISSOLVED; bond shall be returned to Plaintiffs.

IT IS FURTHER ORDERED that the Clerk shall TERMINATE Case Nos. 96-1515 and 96-1524.

IT IS FURTHER ORDERED that the Carriers' Oral Motion for Injunction Pending Appeal [Doc. #45] is GRANTED pursuant to Fed. R. Civ. P. 62(c). The precise wording of the injunction and the amount of the supersedeas bond shall be determined as soon as practicable.

Western Ry. Co. v. United Transp. Union, 422 F.2d 979, 983 (7th Cir. 1970), *rev'd on other grounds*, 402 U.S. 570 (1971).

ENTERED this 17th day of December, 1996.

/s/ Joe B. McDade
JOE B. MCDADE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 7, 1998

Before

HON. RICHARD A. POSNER, *Chief Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. JOHN L. COFFEY, *Circuit Judge*
HON. JOEL M. FLAUM, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. KENNETH F. RIPPLE, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*
HON. ILANA DIAMOND ROVNER, *Circuit Judge*
HON. DIANE P. WOOD, *Circuit Judge*
HON. TERENCE T. EVANS, *Circuit Judge*

No. 96-4175

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff-Counter
Defendant-Appellee,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN RAILROAD COMPANY,
sued as Burlington Northern Railroad,
CONSOLIDATED RAIL CORPORATION, *et al.*,
Defendants-Appellants,

and

NORFOLK SOUTHERN RAILWAY COMPANY, and
NORFOLK AND WESTERN RAILWAY COMPANY,
Counter Plaintiffs-Appellants.

Appeal from the United States District Court
for the Central District of Illinois

Nos. 96 C 1515 & 96 C 1524—Joe B. McDade, *Judge*

ORDER

The case is before the court on a petition for rehearing and suggestion for rehearing in banc filed by the plaintiff-counter defendant-appellee. On consideration of the petition for rehearing and suggestion for rehearing in banc, a vote of the active members of the court was requested. A majority did not favor rehearing in banc. Chief Judge Posner and Circuit Judges Flaum, Rovner and Diane P. Wood voted to grant rehearing in banc. Circuit Judge Cummings took no part in the decision. A majority of the judges on the original panel voted to deny the petition for rehearing. Judge Diane P. Wood voted to grant the petition for rehearing.

Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and hereby is, DENIED.

On further consideration of the petition for rehearing and suggestion for rehearing in banc, the original opinion issued on December 22, 1997, is modified by revising footnote 1 to read as follows:

> The dissent presents thoughtful policy arguments against considering any extrinsic evidence when the plain language of an agreement seems clear. But the Rubicon has been crossed by the Third Circuit in *SEPTA*. *See generally SEPTA*, 882 F.2d at 783-86.

We would find it very difficult to maintain that the suggestion to consult extrinsic evidence, supported by Third Circuit precedent, is "frivolous or obviously insubstantial," *Conrail*, 491 U.S. at 307. The dissent also cites the views of a majority of the judges in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc), as persuasive authority against considering extrinsic evidence in this context. See Slip Op. at 15-16. Even Judge Posner's lead opinion in *Bidlack*, however, recognized that "extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous" when there exists "contractual language on which to hang the label of ambiguous," *id.* at 608—such as the term "employee" in Article XIV. And, of course, *Bidlack* did sanction consideration of extrinsic evidence in the interpretation of the agreement in that case. Further, *Bidlack* dealt with the *merits* of a dispute under the National Labor Relations Act, and for that reason alone could not establish that, in an RLA case, a suggestion to consult extrinsic evidence to uncover a latent contractual ambiguity is a *frivolous* legal argument. This does not mean, and we do not read *SEPTA* to suggest, that all forms of extrinsic evidence are entitled to equal, or even significant, weight.

APPENDIX D

STATUTES INVOLVED

I. Railway Labor Act, 45 U.S.C. § 151 et seq. (excerpts)

A. Section 152 Seventh, 45 U.S.C. § 152 Seventh

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

B. Section 156, 45 U.S.C. § 156

Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination

of conferences without request for or proffer of the services of the Mediation Board.

C. Section 153, 45 U.S.C. § 153

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with the full statement of the facts and all supporting data bearing upon the disputes.

II. Norris LaGuardia Act (excerpts)

A. 29 U.S.C. § 101

Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute,

except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

B. 29 U.S.C. § 107

Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

* * * *

C. 29 U.S.C. § 109

Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

(2)

Supreme Court, U.S.
FILED
AUG 3 1998
OFFICE OF THE CLERK

No. 98-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ATCHISON, TOPEKA & SANTA FE RAILWAY, *et al.*

JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

Counsel for Respondents Norfolk Southern Railway and Norfolk and Western Railway

RALPH J. MOORE, JR.*
DONALD J. MUNRO
SHEA & GARDNER
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 828-2000

**Counsel of Record*

Counsel for Respondents Atchison, Topeka & Santa Fe Railway, Burlington Northern Railroad, Consolidated Rail Corporation, and Union Pacific Railroad

August 3, 1998

30 pp

QUESTION PRESENTED

Whether the language of the particular collective bargaining agreement provision in this case is so clear that a court is precluded from considering the provision's bargaining history in order to determine whether the railroads' contractual interpretation is "frivolous or obviously insubstantial," or is "arguably justified" and thus subject to mandatory arbitration under § 3 of the Railway Labor Act.[1]

---

[1] Rule 15.2 of the Rules of this Court requires respondents to advise the Court if in their view the question presented by petitioner is not presented on the record below. The question tendered by petitioner -- whether a dispute can be a minor dispute when the railroads' contract interpretation is "not arguably justified" by the terms of the agreement, is "refuted" by its "plain language," and "is predicated solely on evidence external to the agreement" -- is not presented by the decision below. As we show herein, both the majority and the dissent in the court below agreed that extrinsic evidence cannot be used to contradict the plain terms of a written agreement, but they disagreed as to whether the particular contract in dispute in this case was sufficiently plain to preclude consideration of the evidence in question. Thus, the case does not present the broad issue stated by petitioner but instead presents only a question as to the application of unchallenged legal principles to particular facts.

LIST OF PARTIES AND RULE 29 LIST

The parties to this proceeding are the petitioner Brotherhood of Maintenance of Way Employes and the following respondents[2] (with parent companies and nonwholly owned subsidiaries):

1. Atchison, Topeka & Santa Fe Railway

   Burlington Northern Santa Fe Railway Company

2. Burlington Northern Railroad

   Burlington Northern Santa Fe Railway Company

3. Consolidated Rail Corporation

   Conrail, Inc.

4. Norfolk Southern Railway Company

   Norfolk Railway Corporation

5. Norfolk and Western Railway Company

   Norfolk Railway Corporation

6. Union Pacific Railroad Company

   Union Pacific Corporation

---

[2] CSX Transportation, Inc., which was an additional party to this action, was dismissed by an order of the Seventh Circuit Court of Appeals dated January 9, 1998, in response to the parties' joint Agreement for Voluntary Dismissal of Appeal as to Appellant CSX Transportation, Inc. Only.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 29 LIST ii

TABLE OF AUTHORITIES iv

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. THE DECISION OF THE PANEL DOES NOT CONFLICT WITH THIS COURT'S *CONRAIL* DECISION 7

II. THE DECISION BELOW TURNED UPON APPLICATION OF ACCEPTED PRINCIPLES TO THE FACTS OF THIS PARTICULAR CASE AND ACCORDINGLY DOES NOT PRESENT ANY IMPORTANT ISSUE OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT 9

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **Page**

Consolidated Rail Corp. v. *Railway Labor Executives Ass'n*,
491 U.S. 299 (1989) ..... *passim*

FDIC v. *W.R. Grace & Co.*,
877 F.2d 614 (7th Cir. 1989),
cert. denied, 494 U.S. 1056 (1990) 13

Order of Conductors v. *Pitney*,
326 U.S. 561 (1946) 12

SEPTA v. *Brotherhood of R.R. Signalmen*,
882 F.2d 778 (3d Cir. 1989),
cert. denied, 493 U.S. 1044 (1990) 8

United Transp. Union v. *South Carolina Pub. Ry. Comm'n*,
130 F.3d 627 (4th Cir. 1997) 8-9

STATUTES:

Railway Labor Act:

§ 2 Seventh, 45 U.S.C. § 152 Seventh 1

§ 3, 45 U.S.C. § 153 1

§ 6, 45 U.S.C. § 156 ..... 1, 2

§ 10, 45 U.S.C. § 160 2

RULES:

Sup. Ct. R. 15.2 i

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN RAILROAD, CONSOLIDATED RAIL CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND UNION PACIFIC RAILROAD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

The case involves Sections 2 Seventh, 3, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 Seventh, 153, and 156, set forth in Appendix D to the Petition.

STATEMENT OF THE CASE

The ultimate issue in this case is whether a dispute between the petitioner union ("BMWE") and the respondent railroads ("railroads") is a minor or a major dispute under the Railway Labor Act ("RLA") -- *i.e.*, whether it should be resolved through mandatory arbitration under § 3 of the RLA or whether instead the union may enforce its position by strikes or injunction. Both the majority and dissenting members of the court below agreed

that the governing test under *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 307 (1989) ("Conrail"), is whether the railroads' interpretation of the collective bargaining agreement is "arguably justified by the terms of the parties' agreement," in which case the dispute is minor and must be arbitrated, or, instead, is "frivolous or obviously insubstantial," in which case the dispute is a major dispute that can give rise to strikes. (Pet. App. 5a, 15a.) The majority and the dissent disagreed, however, about the application of that standard to the specific facts of this case.

The dispute concerns the term "employees" as used in Article XIV of the parties' September 1996 national agreement. Article XIV establishes an entirely new travel allowance for certain maintenance of way employees. The travel allowance provision was not drafted by the parties themselves. It was taken virtually without change from a recommendation in the report of Presidential Emergency Board No. 229 ("PEB 229"), appointed under § 10 of the RLA (45 U.S.C. § 160) to make recommendations for settlement of disputes arising from contract demands in notices exchanged by the parties in 1994 under § 6 of the RLA (45 U.S.C. § 156). (Pet. App. 5a.) The PEB report cautioned that the Board did "not intend[] to write the precise language of the collective bargaining agreement" and that the parties "must work through the ambiguities that inevitably appear in a document dealing with so many complex issues presented in such a short period of time." (J.A. 403).[3] However, the parties, confronted with the 30-day deadline prescribed by § 10, "could not agree on implementing language" for the travel allowance recommendation (as well as several other recommendations), so "[t]hey chose instead to copy verbatim the pertinent recommendation of PEB 229." (Pet. App. 5a.) They thereby "averted a strike" over disputes about the interpretation and application of the recommendations, leaving such disputes for later resolution under the RLA. (Id.; J.A. 117-18).

---

[3] The Joint Appendix in the court below is cited as "J.A." herein.

In consequence, the provision in Article XIV in dispute, which the union calls "definitional,"[4] reads like a summary of issues addressed, not a contract. It states:

> "At the beginning of the work season *employees* are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the Carriers' service may place them hundreds of miles away from home at the end of each work week. Accordingly, the Carriers will pay to each *employee* a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip" (Pet. App. 19a, 6a) (emphasis added).

The provision then sets forth a schedule of payments for distances traveled and an air travel option, without further definition of the "employees" covered by the provision. (Pet. App. 24a-25a.)

Notwithstanding the imprecision of the travel allowance recommendation itself, the PEB clearly identified the underlying union concerns that it was addressing with this recommendation, stating that the union contended that maintenance of way employees "subsidize the Carriers' *regional and system gangs* with staggering amounts of unpaid travel time and unreimbursed automobile expense for travel between their homes and distant work locations." (Pet. App. 11a-13a; J.A. 369) (emphasis added). This distillation of the union's bargaining position was based on the union's own submissions and testimony to the PEB. As the court below noted, in several instances the union itself linked the issue of travel allowances to regional and system

---

[4] Brief of BMWE to the Seventh Circuit at 11 (Feb. 12, 1997).

gangs. (Pet. App. 12a.) The union's witness on travel allowances explained the "fundamental purpose" and "goal" of the union's travel allowance demands, stating:

> "Here is what we are after, here is what [the BMWE] wants out of this [travel allowance] proposal": "We believe maintenance-of-way employees should not be required to subsidize the carriers' most productive gangs, its *regional and system gangs*, by traveling long hours without pay or travel expense to work on the gangs." (Pet. App. 12a-13a) (emphasis added).

This dispute over Article XIV arose when the railroads began to implement the parties' new agreement. As the court below observed, Article XIV does not "define[] which employees are to be covered" (Pet. App. 6a). Neither side claims that the term "employees" in the agreement should be literally applied to cover *all* employees who travel to work, including those who must commute to their work sites at the beginning of each week and those who travel daily from a central reporting point to various locations on the railroad. Rather, the union claims that the agreement applies to a smaller subset -- so-called "traveling employees" who have no fixed "headquarters" at which they report throughout the year. The railroads claim that the term applies to an even smaller subset -- members of seasonal gangs (often called regional and system gangs) whose work often takes them hundreds of miles from home across seniority district lines. As both sides acknowledge, however, the agreement itself does not explicitly limit its application either to traveling employees without a "fixed headquarters," as the union contends, or to "regional and system gang" members, as the railroads claim.

The railroads believe that the PEB took the union at its word, recommending a settlement that provided a new travel allowance for regional and system gang members. The union claims, on the other hand, that the PEB gave it what it had demanded in its initial Section 6 notice, rather than the more limited allowance

it told the PEB "is what we are after."[5] It sued the railroads in the Central District of Illinois for an injunction against the railroads' alleged violation of the "plain" terms of Article XIV and called a surprise strike against two of the respondents, which was temporarily restrained pending decision. (Pet. App. 3a; J.A. 27.)

The district court agreed with the union that Article XIV plainly covers all "travelling employees" without "fixed headquarters," despite the fact that the agreement does not contain this phrase.[6] (Pet. App. 30a.) It therefore refused to consider the PEB hearings and report (Pet. App. 30a-31a) and granted the union's request for an injunction against the railroads' alleged violation, denying the railroads' request for an injunction against strikes. It enjoined strikes pending appeal, however. (Pet. App. 35a-36a.)

On appeal, a divided panel of the court of appeals reversed. The majority and the dissent did not disagree about the governing legal principles. The dissent agreed with the majority that the ultimate question is governed by the standard settled by *Conrail*, that a "dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement" and "is major only where 'the employer's claims are frivolous or obviously insubstantial.'" (Pet. App. 15a, 5a.) The majority agreed with the dissent that "extrinsic evidence cannot be used

---

[5] While neither side formally withdrew its opening demands with respect to this or many other issues, the PEB, whose job was to fashion a settlement, sought to have them identify their real goals in an effort to narrow the issues in dispute. (J.A. 361-64.)

[6] The district court unaccountably stated at one point in its opinion that "the Carriers appear to concede that the plain language of Article XIV of the CBA unambiguously applies to all travelling employees." (Pet. App. 28a.) Although petitioner stresses that statement in its petition, no such concession appears anywhere in the record. To the contrary, the railroads consistently argued that the PEB language best describes regional and system gangs. (J.A. 106-07.) At most, the railroads conceded that the language is ambiguous. Id.

to override the 'express provisions of a written contract'" and that the "RLA does not free either party from the consequences of agreeing to a text." (Pet. App. 8a-9a, 17a.)

They disagreed, however, about the application of those principles to the particular agreement provision in issue here. The majority concluded that the undefined term "employees" in the agreement was not so definitive that it was "frivolous" for the railroads to rely on the PEB hearings and report to show a latent ambiguity as to which employees were covered. (Pet. App. 6a, 13a-14a.) The dissent believed that the terms of the agreement were so "absolutely unambiguous" that resort to extrinsic evidence would contradict the plain meaning of this particular contract provision. (Pet. App. 16a, 20a.)

The entire court of appeals then denied a suggestion for rehearing *en banc*. On consideration of the suggestion, however, the panel modified a footnote in the original opinion, to make clear, if it was not already clear, that the panel majority did not disagree with the principle relied on by the dissent, but only with its application here, confirming that in the majority's view "the term 'employee' in Article XIV" was sufficiently "ambiguous" to allow consideration of the extrinsic evidence relied on by the railroads in determining whether the railroads' interpretation of the agreement was arguably justified by the agreement and thus subject to mandatory arbitration.[7] (Compare Pet. App. 9a. n.1 with Pet. App. 39a-40a.)

---

[7] On May 19, 1998, following issuance of the court of appeals' mandate, the district court entered an injunction against strikes over the parties' dispute and dismissed the union's claims.

REASONS FOR DENYING THE WRIT

The decision below does not raise any important issue of federal law that has not already been settled by this Court, nor does it conflict with decisions of this Court or any other court. Rather, it turns on the application of well-established principles to particular facts. Accordingly, the petition for certiorari should be denied.

I. THE DECISION OF THE PANEL DOES NOT CONFLICT WITH THIS COURT'S *CONRAIL* DECISION

The union's principal argument in its petition is one that it pursued unsuccessfully in the court of appeals below -- that the *Conrail* test incorporates an implicit "parol evidence" rule because it requires that a carrier's interpretation be arguably justified "by the terms of the parties' agreement." (Pet. at 10-11.) In other words, the union argues that courts are restricted to the language of the agreement alone when determining whether the carrier's position is "frivolous" or not.

This contention was not accepted by either the majority or the dissent in the court below, as it is obviously incorrect. The particular phrasing of the major-minor test on which the union relies is merely one of the many ways this Court described that test in *Conrail*. For example, it also stated that the question is whether the carrier's interpretation is "frivolous or obviously insubstantial." 491 U.S. at 307, 312. Elsewhere, the Court examined whether the carrier's interpretation is "arguable." *Id.* at 319. None of these other phrasings incorporates the words "by the terms of the agreement." Thus, it is inappropriate to accord

any special meaning or significance to the particular phrasing emphasized by the union.[8]

Moreover, the issue of when extrinsic evidence may be considered to interpret a written bargaining agreement was not even presented in *Conrail*, which did not involve the interpretation of a written provision. But to the extent that the *Conrail* decision gave any hint about the appropriateness of references to extrinsic evidence in this context, it indicates that such evidence may be considered. The collective bargaining agreement in that case was silent as to the matter in dispute, and so the question turned on the carrier's reliance on implied terms. The *Conrail* Court therefore looked to extrinsic evidence in the form of "past practice, custom, and usage" to interpret the agreement -- a fact that simply cannot be squared with the union's "parol evidence" theory. *Id.* at 318, 319.

No court of appeals has ever adopted the BMWE's "implicit parole evidence rule" interpretation of the *Conrail* decision. To the contrary, every court of appeals that has considered the use of extrinsic evidence in this context has ruled that such evidence may be used to demonstrate that a railroad's contractual position is "arguably justified." *See SEPTA* v. *Brotherhood of R.R. Signalmen*, 882 F.2d 778, 785 (3d Cir. 1989) (holding that "it was proper for the district court to use parol evidence" in making RLA major/minor dispute determination despite apparent conflict with the language of the agreement); *United Transp. Union* v. *South Carolina Pub. Ry. Comm'n*, 130 F.3d

---

[8] The *Conrail* decision notes that "[v]erbal formulations of [the major-minor] standard have differed over time and among the Circuits: phrases such as 'not arguably justified,' 'obviously insubstantial,' 'spurious,' and 'frivolous' have been employed. 'These locutions are essentially the same in their result. They illustrate the relatively light burden which the railroad must bear' in establishing exclusive arbitral jurisdiction under the RLA." 491 U.S. at 306-07 (citations omitted).

627, 635 (4th Cir. 1997) (reversing district court decision finding a dispute to be "major" under the RLA because of "unambiguous" contract language because the court had failed to consider past practice, implied and express terms of related agreements, the bargaining history of the agreements, and other extrinsic evidence). There is no basis, therefore, for suggesting that the decision of the Seventh Circuit is "in conflict" with the *Conrail* decision or any other decisions.

II. THE DECISION BELOW TURNED UPON APPLICATION OF ACCEPTED PRINCIPLES TO THE FACTS OF THIS PARTICULAR CASE AND ACCORDINGLY DOES NOT PRESENT ANY IMPORTANT ISSUE OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT

BMWE asserts that the decision of the Seventh Circuit is fundamentally at odds with the "purpose and structure" of the RLA because "[i]f the decision below is allowed to stand it would be virtually impossible for a union to show a unilateral change [in agreements] because even a departure from clear contract language would not be enough to establish a violation of Sections 2 Second and 6." (Pet. 15-16.) Thus, according to petitioner, "a mere assertion that extrinsic evidence suggests a possible latent ambiguity in facially plain language would be enough to defeat federal court jurisdiction to enforce those provisions." *Id.*

But the decision below bears no such extravagant construction. Rather, it is grounded in generally accepted legal principles as to which both the majority and the dissenting member were in accord, though they disagreed as to the application of those principles to the facts of this case. In particular they disagreed only about whether the specific language presented by Article XIV of the 1996 National

Agreement was so "absolutely unambiguous" as to bar the use of extrinsic evidence in interpretation.

The pivotal contractual term in this case is "employees." The Agreement prescribes that travel expenses are to be paid to "employees" who traveled specified distances. It does not define the term "employees," but rather leaves the term open-ended. (Pet. App. 6a, 40a.) No one contended below, however, that the term was intended to mean literally "all" employees. The union argues for one possible limitation ("traveling employees" without "fixed headquarters"), while the railroads argue for another (regional and system gangs).

Since there is no contractual language limiting the term "employees" to regional and system gangs -- nor, it might be added, to "traveling employees" without "fixed headquarters" -- the court below concluded that "if the act of interpretation were to stop at the four corners of the Agreement," the railroads' position could not be sustained. (Pet. App. 7a.) Moreover, the court acknowledged that, as a general matter, "extrinsic evidence cannot be used to override the 'express provisions of a written contract.'" (Pet. App. 8a-9a.) However, especially in light of the body of Supreme Court decisions establishing that collective bargaining contracts "fall into a different order of legal instrument from an ordinary contract" and "should [be] interpret[ed] . . . with a keen eye for the nuances of context," (Pet. App. 8a, 7a), the court looked to a limited and highly relevant part of the bargaining history -- the proceedings before the Presidential Emergency Board -- to determine whether a "latent ambiguity" may exist in the Agreement. (Pet. App. 9a.)

The court was sensitive to the "danger in opening the door too wide to extrinsic evidence" but concluded that such a "danger is not present here." (Pet. App. 10a.) Rather, it concluded that the "hearings and report of the Presidential Emergency Board 229 . . . is a particularly apposite slice [of the

bargaining history] for our purposes." *Id.* That was so "because the negotiators took a chunk of PEB 229's report and inserted it word-for-word in the Agreement" as the very provision in dispute here. In sum, the court had "a manageable and definable set of documents, collected from an official hearing, from which the parties drew the language at issue in this case." *Id.*

Examining this limited aspect of the bargaining history, the majority "readily agree[d]" with the railroads' claim that it was "proof positive that when the PEB drafted the future Article XIV, the Board thought that the union's overarching concern was regional and system gangs." (Pet. App. 11a.) It noted:

> "When PEB 229 pronounced its understanding of the union's general contentions, it explicitly linked the issue of travel allowances to regional and system gangs, not all traveling employees. . . . The PEB also explained the union's specific proposal on travel allowances in terms of regional and system gangs. . . . In several instances the union itself straightforwardly framed the issue of travel allowances around the regional and system gangs." (Pet. App. 11a-12a.)

The "starkest example," the court observed, was the testimony referred to above in which BMWE's witness on the travel allowance issue told the Board that the union's "fundamental proposal" --"what we are after" -- with respect to travel allowances was a remedy for uncompensated travel time and expenses of members of "the carriers' most productive gangs, its regional and system gangs." (Pet. App. 12a-13a.) This focus upon regional and system gangs was to be expected, because, as the court noted in tracing the history of this dispute, "the issue of regional and system gangs" had held "the limelight" in railroad

labor strife since Congress imposed the previous national agreement on the parties in 1991. (Pet. App. 5a.)

In these circumstances, the majority below concluded that "a latent ambiguity may exist in the Agreement, namely that the PEB meant only to refer to regional and system gangs," and that accordingly the railroad's position was "'arguably justifiable' and not 'frivolous'" within the meaning of the *Conrail* rule. (Pet. App. 13a-14a.) The majority ruled that the dispute should be arbitrated, rather than be resolved in litigation in federal court or through a nation-wide railroad strike.[9]

The dissenter below, while noting that "there is much in the majority's opinion with which [she was] in full agreement," nevertheless "disagree[d] with its ultimate conclusion." (Pet. App. 14a.) (Wood, J., dissenting). But she did so not because of a disagreement over fundamental principles of RLA jurisprudence or contractual interpretation, but rather over the application of these principles governing admissibility of extrinsic evidence to the unusual contract language in this particular case.

The dissent relied primarily on the principle that "extrinsic evidence may [not] be used to contradict explicit terms of a collective bargaining agreement" when the "plain language" of the agreement is "unambiguous." (Pet. App. 17a.) But, as we have noted, the majority also emphasized this same principle in its own analysis of the relevant legal rules. (Pet. App. 9a.) In short, the majority and the dissent agreed on the basic rule.

---

[9] This result is consistent with prior decisions by this Court that emphasize 1) the legislative desire to keep these railway labor disputes out of the court system and 2) the need to have these disputes resolved by expert arbitrators who are versed in the "intricate and technical" problems of the railroad industry. *See, e.g., Order of Conductors* v. *Pitney*, 326 U.S. 561, 567 (1946).

The difference between the majority and the dissent was simply that they disagreed about how clear this particular contract language was. Unlike the dissent, the majority did not view the contractual provision involved here as "absolutely unambiguous and complete," since the term "employees" is not expressly defined. Thus, the majority below did not believe that the limitation of the term "employees" to a particular type would "contradict" explicit terms, as it would have if the term were defined in the bargaining agreement to extend to other types of employees. That is, had the contract defined "employees" as "all traveling employees" without "fixed headquarters," extrinsic evidence presumably could not be employed to restrict that term to "regional and system gangs." But the Agreement leaves the term open-ended. (Pet. App. 6a.) In these circumstances, the majority invoked the "latent ambiguity" rule expressed in *FDIC* v. *W.R. Grace & Co.*, 877 F.2d 614 (7th Cir. 1989), and looked to an especially reliable body of extrinsic evidence to ascertain whether the parties intended that a term unlimited on its face was to have a more limited meaning:

> "So parol and other extrinsic evidence is admissible . . . to demonstrate that the contract is ambiguous. Admissible, that is to say, even if the contract has no intrinsic ambiguity -- even if it would seem perfectly clear to a normal reader of English, although to persons knowledgeable about the circumstances in which the contract had been intended to apply the 'normal' reading might be nonsense. That is what it means to say that extrinsic evidence is admissible to *demonstrate* an ambiguity. There is no ambiguity on the surface of the document; the ambiguity appears only when extrinsic evidence is considered" *Id.* at 620-21 (citations omitted; emphasis in original.)

In short, the only question that would be presented for review by this Court would be whether the language in this particular collective bargaining agreement, in the circumstances of this particular case, is so "explicit," so "absolutely unambiguous and complete," that no extrinsic evidence, however compelling, may be considered to determine whether the railroads' interpretation is "frivolous." A decision on that question, even if contrary to the decision below, would be of no abiding importance, but good for this case only. And so far as this case is concerned, the union will have ample opportunity to persuade an arbitrator of the correctness of its view of the meaning of the Agreement; the arbitrator will be able to provide relief if the union's position is sustained. *Conrail*, 491 U.S. at 310 n.8.

* * * *

In sum, the decision below is in harmony with the principles uniformly applied concerning the interpretation of collective bargaining contracts and the determination of the question whether a dispute is major or minor under the RLA. There is no substance to the union's effort to convert a simple difference of opinion between the majority and the dissent respecting the clarity of the unique language in this particular contract into a major issue of federal law, much less a conflict with this Court's decision in *Conrail*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

Counsel for Respondents Norfolk Southern Railway and Norfolk and Western Railway

RALPH J. MOORE, JR.*
DONALD J. MUNRO
SHEA & GARDNER
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 828-2000

**Counsel of Record*

Counsel for Respondents Atchison, Topeka & Santa Fe Railway, Burlington Northern Railroad, Consolidated Rail Corporation, and Union Pacific Railroad

August 3, 1998

Supreme Court, U.S.
FILED
AUG 14 1998
CLERK

(3)

No. 98-46

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:
WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 Evergreen Road
Suite 200
Southfield, MI 48076
(248) 948-1010

DONALD F. GRIFFIN
Assistant General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G Street, N.E.
Suite 460
Washington, D.C. 20001-1511
(202) 638-2135

RICHARD S. EDELMAN *
Of Counsel
O'DONNELL, SCHWARTZ & ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824
Attorneys for Petitioner

Date: August 14, 1998

* Counsel of Record

WILSON - EPES PRINTING CO., INC. 789-0096 - WASHINGTON, D.C. 20001

11 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. RESPONDENTS HAVE MISCHARACTERIZED THE DECISION BELOW	1
II. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT THE COURT OF APPEALS APPLIED A MAJOR/MINOR TEST THAT IS AT ODDS WITH THE TEST ENUNCIATED BY THIS COURT, AND THAT FAILURE TO REVIEW ITS DECISION WILL UNDERMINE OPERATION OF THE RAILWAY LABOR ACT	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Railway Co., et al., 138 F.3d 635 (7th Cir. 1998) ..... *passim*

Consolidated Rail Corp. v. Railway Labor Exec's Ass'n, 491 U.S. 299 (1989) ..... *passim*

Hawaiian Airlines v. Norris, 512 U.S. ——, 129 L.Ed.2d 208 (1994) 6

Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen, 882 F.2d 778 (3rd Cir. 1989).. 3, 7

STATUTES:

Railway Labor Act, 45 U.S.C. § 151 *et seq.*

Section 2 Seventh, 45 U.S.C. § 152 Seventh..... *passim*

Section 3, 45 U.S.C. § 153 ..... *passim*

Norris LaGuardia Act, 29 U.S.C. § 101 *et seq.*..... 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-46

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONER

This brief is submitted by petitioner Brotherhood of Maintenance of Way Employes ("BMWE") to reply to respondents' brief in opposition to BMWE's petition for a writ of certiorari for review of the Seventh Circuit's decision in *Brotherhood of Maintenance of Way Employes v. Atchison, Topeka & Santa Fe Railway Co., et al.*, 138 F.3d 635 (7th Cir. 1998).

I. RESPONDENTS HAVE MISCHARACTERIZED THE DECISION BELOW

Respondents have asserted that this Court should not grant BMWE's Petition because the Court below properly viewed the case as a garden variety "minor dispute." They claim that the Court of Appeals merely held that language of the contract provision in question (Article XIV—Travel Allowance) is ambiguous, and with evidence extrinsic to the agreement, the Railroads had shown their interpreta-

tion of the agreement to be arguable and the dispute minor. Brief in Opp'n at 5-6, 9-14. However, respondents have mischaracterized the Seventh Circuit's decision.

The District Court found the provision in the parties' agreement concerning travel expense allowances to be plain as to its scope of application. Pet. App. B at 28a. The District Court reviewed the language of Article XIV which described the characteristics of the employees it covered, and concluded that the plain language of Article XIV applies to all employees who travel between their worksite and their homes during the work season. *Id.* Indeed, the District Court found that the railroads apparently "concede[d], that the plain language of Article XIV of the CBA unambiguously applies to *all* traveling employees." [1] *Id.*

Respondents have argued that the Appeals Court differed with the trial court on the clarity of the scope of coverage of Article XIV, (Brief in Opp'n at 6, *citing* Pet. App. A at 6a, 13a and 14a), but the Court of Appeals stated "[w]ere we to view Article XIV in a vacuum, we would conclude, as the district court did, that the railroads' position is feeble," (Pet. App. A at 6a), that the "railroads propose a theoretically plausible distinction [between types of traveling employees], but one that has no basis in the text," that "[w]e would hold the railroads'

---

[1] The Railroads claim that the district court "unaccountably" found that the Railroads had conceded that the agreement language is clear. Brief in Opp'n at 5, n.6. Although the Railroads maintained that the provision was susceptible to differing interpretations, they did not refute BMWE's showing that the definitional terms in the provision were clear. On cross-examination, the Railroads' witness conceded that the definitional terms had commonly accepted meanings. *See* Brief of BMWE to the Seventh Circuit (Feb. 12, 1997) at 5-12 (citing the transcript of the testimony of the Railroads' witness). Because the District Court's finding was premised upon its assessment of the evidence submitted, including the testimony of witnesses, the Railroads may not properly challenge that court's finding that they essentially conceded the plain meaning of the provision in question.

view 'frivolous or obviously insubstantial' and affirm the district court—if the act of interpretation were to stop at the four corners of the Agreement," and that "the railroads' position would be frivolous, if we could not incorporate sources of meaning beyond the Agreement itself." Pet. App. A at 7a.

Thus, the Seventh Circuit found the Railroads' position to be frivolous based on the contract language alone.

The Railroads assert that the majority below viewed the contract language as ambiguous because "the term 'employees' is not expressly defined" and that the minor dispute holding was predicated on that alleged ambiguity in the contract. Brief in Opp'n at 10, 12. However, the majority expressly based its holding on the bargaining history offered by the Railroads. The majority deemed that extrinsic evidence was sufficient to create ambiguity in otherwise clear language. The Court said that its purpose was to "ascertain whether the ostensible meaning of Article XIV—lucid and definitive as it might seem—is in fact the right one." Pet. App. A at 9a. It further stated that it was obligated to look "beneath the surface of that text" if bargaining history suggested latent ambiguity. Pet. App. A at 10a. Additionally, the majority's response to the dissenting Judge (as modified in the denial of the petition for rehearing en banc) stated that she "presents thoughtful policy arguments against considering any extrinsic evidence when the plain language seems clear. But the Rubicon has been crossed by the Third Circuit in *SEPTA* [*Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen*, 882 F.2d 778, 783-86 (3rd Cir. 1989)]." Pet. App. C at 39a. Finally, when the Court stated its holding it said "[b]ased on what the PEB said and how the parties had cast their views before it, we think that a latent ambiguity may exist in the Agreement, namely that the PEB meant only to refer to regional and system gangs. The railroads' interpretation therefore is 'arguably justifiable' and not 'frivolous'." Pet. App. A at 13a-14a, citation omitted.

Accordingly, the Court of Appeals did not find a minor dispute based on a determination that the terms of the agreement could arguably be read to support the Railroads' position. Nor did it hold that resort to extrinsic evidence was permissible because the agreement language was not clear. Rather, the Court below found a minor dispute even though it recognized the agreement language to be clear, and that finding was predicated solely on evidence other than the terms of the agreement.

II. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT THE COURT OF APPEALS APPLIED A MAJOR/MINOR TEST THAT IS AT ODDS WITH THE TEST ENUNCIATED BY THIS COURT, AND THAT FAILURE TO REVIEW ITS DECISION WILL UNDERMINE OPERATION OF THE RAILWAY LABOR ACT

Respondents have disputed BMWE's assertion that the Seventh Circuit applied a major/minor test that is fundamentally at odds with this Court's decision in *Consolidated Rail Corp. v. Railway Labor Exec's Ass'n*, 491 U.S. 299 (1989) ("*Conrail*") and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). Respondents claim that *Conrail* does not require that a carrier's minor dispute claim must be arguable *under the terms of the parties agreement*. They observe that the *Conrail* decision noted that various appellate courts had used the phrases "frivolous or obviously insubstantial" and "arguable" without following them with "under the terms of the agreement"; and that the Court cited appellate decisions that used other locutions such as "not arguably justified" and "spurious." Brief in Opp'n at 7-8, n.8. However, as is shown in BMWE's petition, (Pet. at 9-12), when this Court described its test and when it stated its holding, it repeatedly, expressly tied the arguability inquiry to the "terms of the parties' agreement." 491 U.S. at 307, 310, 320.

By arguing that *Conrail* requires that a carrier demonstrates that its contractual defense is arguable under the

terms of the parties' agreement, BMWE has not asserted, as the Respondents claim, (Brief in Opp'n at 7), that *Conrail* restricts courts to written agreements in making major/minor determinations. Rather, as the *Conrail* decision shows, a contractual defense may be predicated on either an express agreement or one implied from past practice. *See* 491 U.S. at 308, 311 (written agreement was silent as to the subject in dispute, but the Court determined that there was an implied agreement on the subject that arguably justified the carrier's actions; the Court did not look to non-agreement evidence in finding a minor dispute, but rather limited itself to the terms established by the past practice). Moreover, if the agreement terms are shown to be ambiguous and thus not dispositive of the dispute, then a court does not run afoul of *Conrail* by relying in part on evidence extrinsic to the agreement in deciding whether the carrier's interpretation of the contract arguably has merit. But, under *Conrail*, a court can not find a minor dispute under Section 3 of the RLA if the carrier's position is based solely on evidence other than the terms of the parties' agreement.

Furthermore, the *Conrail* decision explained why the carrier's arguability showing must be measured against agreement terms. The Court stated that the carrier's contract interpretation must be measured against the terms of the agreement because a finding of a minor dispute on "insubstantial grounds would be to undercut 'the prohibitions of § 2, Seventh and § 6 of the Act' against unilateral imposition of new contractual terms." 491 U.S. at 306. Thus, the holding that a carrier cannot prevail in a minor dispute claim if its position is not arguably justified by terms of the agreement was not an inconsequential linkage of the carrier's claims to the terms of the agreement, nor was it just one of a number of phrasings of the major/minor test; the linkage was a deliberate effort to avoid undercutting Section 2 Seventh of the RLA which prohibits unilateral changes in agreement

terms. 491 U.S. at 306; *see also Hawaiian Airlines v. Norris*, 512 U.S. ——, 129 L.Ed.2d 203, 219 (1994).

This balance between RLA Sections 2 Seventh and 3 tilts toward Section 3 because the Court placed a "relatively light burden" on carriers who defend unilateral change cases by asserting contractual defenses. However, the statutory scheme necessitated the requirement that the contractual defense be at least arguable under the terms of the contract. The contractual support need not be compelling or even persuasive, but if the claim does not even have a minimal level of support in the agreement Section 3 is inapplicable and the dispute is major. Accordingly, by deleting the terms of the agreement component from the major/minor determination, the court below applied a test that ignored this Court's careful balancing of Sections 3 and 2 Seventh of the RLA, effectively negating Section 2 Seventh.

Respondents have asserted that review of the decision below would only resolve the dispute between these parties under Article XIV of the recent national agreement between BMWE and the Railroads. Brief in Opp'n at 7, 9, 14. But the key question in the case was whether the Railroads could rely on bargaining history evidence to attempt to prevail on their minor dispute claim even though the agreement language was clear and unambiguous. If the Court of Appeals had agreed with the District Court that the Railroads could not make their case solely on bargaining history evidence, the District Court's decision would have been affirmed because the Seventh Circuit found the Railroads' position to be frivolous under the terms of the agreement. Pet. App. A at 5a-7a. Thus, the issue before this Court would not involve weighing of the evidence with respect to Article XIV, but rather resolution of the question of whether the Court of Appeals properly interpreted and applied the RLA and this Court's decision in *Conrail*.

BMWE submits that it is also significant that the Railroads support the Seventh Circuit's reliance on the Third Circuit's decision in *SEPTA*. Brief in Opp'n at 8. Because Respondents are every major railroad in the United States and because every major railroad can litigate in the Third Circuit or Seventh Circuit, the decision below will effectively displace *Conrail* as the standard for classifying RLA disputes, and Section 3 will completely overwhelm Section 2 Seventh if the decision is not reviewed by this Court. The Railroads' effort to eliminate Section 2 Seventh through judicial action should be denied by a grant of BMWE's Petition.

The Railroads' final argument against the Petition is that there is no harm in the minor dispute finding because BMWE will have the opportunity to persuade an arbitrator that the Union is correct on the merits. Brief in Opp'n at 14. As this Court held in *Conrail,* however, that is not the way the statute was designed; only if a carrier can demonstrate that its contract interpretation is arguably jusified under the terms of the parties' agreement is the union required to arbitrate the dispute. As BMWE demonstrated in its Petition, (Pet. at 8-9, 16-17, 20), the RLA does not require arbitration for all disputes; it specifically directs contract change disputes to a notice, negotiation, and status quo process. A unilateral change effected by management without compliance with that process but under the guise of a contract interpretation that can not even arguably be justified under existing contract terms is inconsistent with the statute. The classification of such dispute as minor prevents strikes, but does so by overriding a key component of the RLA, by vitiating the statutory balance between the mechanisms for resolution of disputes over changes in agreements and disputes over interpretation of agreements, and by negating the established Norris-LaGuardia Act ban on anti-strike injunctions except where strikes are prohibited under the labor laws. Consequently, the fact that BMWE

could obtain an arbitration decision on the merits of the travel allowance dispute does not ameliorate the harm to the statutory scheme that will result if the decision below is allowed to stand.

CONCLUSION

The Court should grant the writ sought by BMWE, and review and reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Of Counsel:
WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 Evergreen Road
Suite 200
Southfield, MI 48076
(248) 948-1010

DONALD F. GRIFFIN
Assistant General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G Street, N.E.
Suite 460
Washington, D.C. 20001-1511
(202) 638-2135

RICHARD S. EDELMAN *
Of Counsel
O'DONNELL, SCHWARTZ & ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824
Attorneys for Petitioner

Date: August 14, 1998

* Counsel of Record